

Supreme Court of the United States

OCTOBER TERM, 1914

No. 150.

JOSEPHINE P. MCGOWAN, EXECUTRIX, ET AL.

v.

EMILY E. PARISH, EXECUTRIX.

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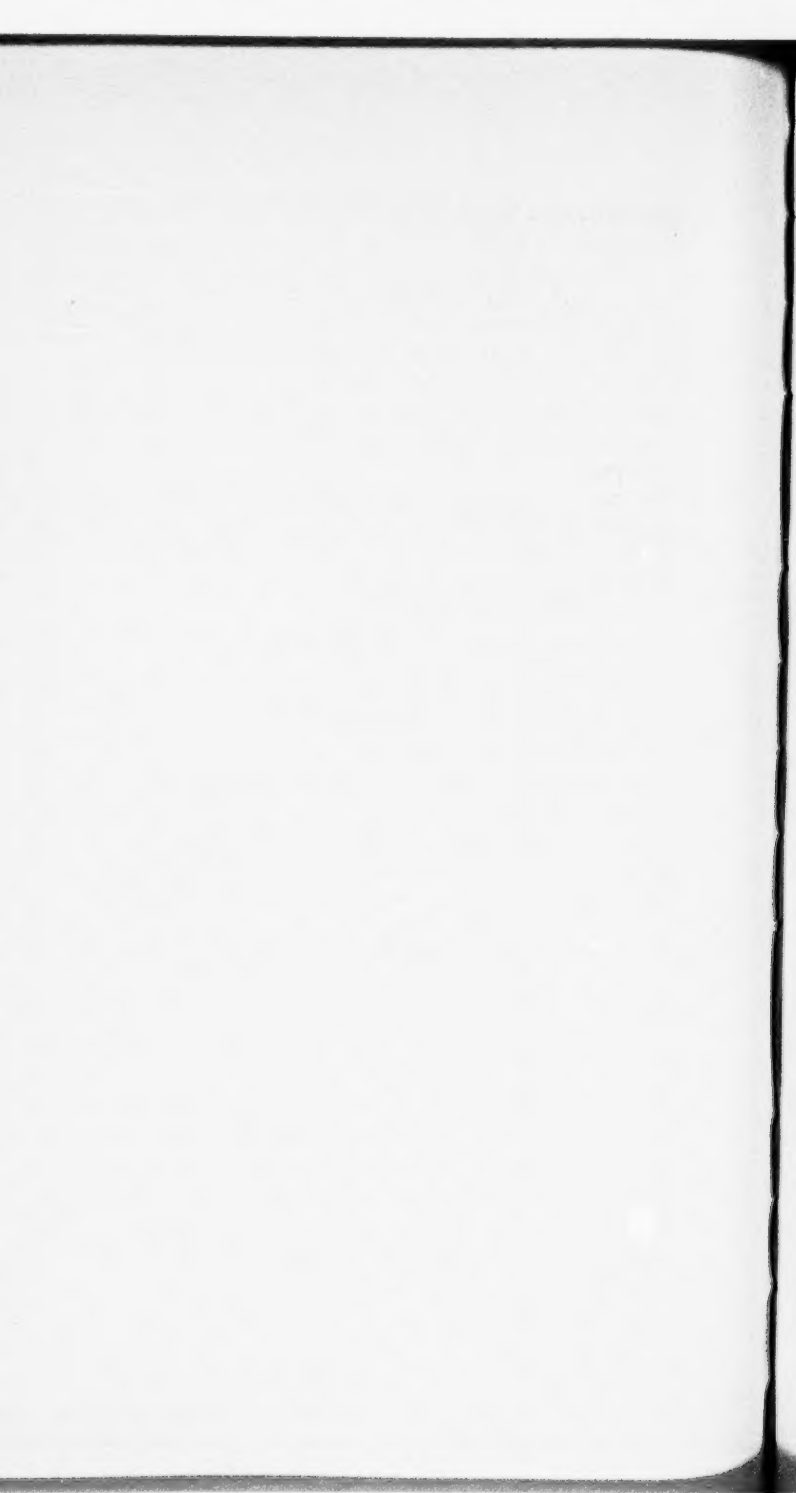
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Supreme Court of the United States

OCTOBER TERM, 1914

No. 150

JOSEPHINE P. MCGOWAN, EXECUTRIX OF JONAS H.
MCGOWAN, DECEASED, AND ELIZABETH V. BROOKSHIRE,
APPELLANTS,

vs.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH,
DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF APPELLEE.

I

HISTORY OF THE CLAIM

In March, 1863, J. W. Parish entered into a contract (made definite by the order of the Surgeon General's Office) to supply the Government during that year 30,000 tons of ice for the Medical Department of the Army, fully set out in *Parish vs. MacVeagh*, 214 U. S., 12. The Government refused to pay anything on account of the ice which had been bought and stored, but in consequence of the suspending order, not delivered. By an act of

May 31, 1872, Parish was authorized to bring an action in the Court of Claims to enforce his rights. Here it was held that the order did not constitute a contract. On appeal the United States Supreme Court reversed this judgment, but held that as Parish had made no tender of the undelivered ice he could not recover the profits under the contract, but only the money expended in the endeavor to fulfill it. The Court of Claims held that it could not reopen the case for additional evidence, but on that before it, awarded the claimant \$10,444.91. December term, 1879 (from October, 1879, to May, 1880), 15, Court of Claims. The attorneys for Parish in both courts were John B. Sanborn and R. P. Lowe (*Parish vs. U. S.*, 12 Court of Claims, 617; 100 U. S., 500). After a reference to the War Department to ascertain the facts, an act was passed directing the Secretary of the Treasury to pay to Parish \$58,341.85, in addition to what he had received, "being the balance of money laid out and expended by him, &c." (act of February 20, 1886; 24 Stat., 653-4).

How soon thereafter does not appear from the record; but during the last decade of the last century Parish brought before Congress his claim for the contract price, less the transportation price which had not been incurred. The record shows the report made to the House by Mr. Graff from the Committee on Claims of the 55th Congress, bearing date January 10, 1898, among other things stating: "It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation, that Parish never offered to deliver the ice." * * * On the false assumption that no delivery was tendered the court laid down the rule that the claimants were only "entitled to be paid for the ice that was lost." * * * In the case of the *U. S. vs. Behan*, 110 U. S., 338, which was decided four years later than the Parish case and which is now the rule, the court lays down the case as follows: * * * "All the present bill contemplates is a

final and proper settlement on the rule of law which is older than our Republic. * * * The propositions contained in the bill which we here report were embraced in a House bill in the last Congress (*i. e.*, the Congress extending from March 4, 1895, to March 4, 1897) and favorably reported from this committee. In that report the committee states that the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States, under the rule of damages prescribed by the Supreme Court in *U. S. vs. Behan*" (Rec., 208-9).

It appears that between 1895 and 1897 a report like that from which these extracts are made and bill like that reported by this committee had been submitted. On June 2, 1900, Mr. Mason, from the Senate Committee on Claims (56th Congress), made a report from the Senate Committee on Claims, which seems to be word for word like the one in the 55th Congress, in support of a bill also the same (*id.*, 209). Both of these reports were made prior to the contract with McGowan, which bears date August 4, 1900. After this date, viz., on May 17, 1902 (the 57th Congress), Mr. Graff submitted to the House a report very nearly, if not quite, identical with that submitted by him in January, 1898 (*id.*, 190). At the end of this report is appended a list of authorities (*id.*, 195), which Mr. Brookshire testifies was prepared by himself and by the committee added to the report. This addition caused no alteration in the prior part of the report, which, as stated in the first sentence thereof, is a literal copy of "Senate Report No. 351, 57th Congress" (*id.*, 190), submitted to the Senate on February 5, 1902 (*id.*, 200), and this last being the verbatim copy of the report to the 56th Congress also by Mr. Mason (*id.*). The report of the House Committee of May 17, 1902 (which down to a list of reported cases prepared, the complainant Brookshire testified by himself), is the transcript of the report

of the Senate of February 5, 1902, was offered in evidence in behalf of complainants. This collection of reported cases is the only contribution presented in writing of either complainant to the deliberations of the Committees of the two Houses. The record contains no offer of proof that either complainant wrote a word of the report of the Senate Committee, adopted without alteration by the House Committee, and no suggestion that either had any part or even knew of the earlier reports submitted to Congress prior to the employment of either complainant, for the ice claim before Congress in 1902-3, by J. W. Parish. The complainant Brookshire says: The Committee wished to know (in 1902-3) whether Mr. Parish had possessed himself of the 30,000 tons of ice, was prepared to deliver the same, and whether the rule of damages laid down in the Behan case should be substituted for that laid down in the Parish case, and that the purpose of the authorities he submitted, was to satisfy the committee, "*if possible*," that their inquiries were properly answered. But long before all these doubts had been solved. If the committee had forgotten the solution, all that was needed was to hand the chairman in 1902, the report which the same man had made in 1898. The cause for anxiety to satisfy the committee, "*if possible*," is not apparent.

On February 17, 1903, was approved the act to refer the Parish claim "to the Secretary of the Treasury for examination and payment of any balance found due" (*id.*). The auditor for the War Department found a balance due Parish of \$181,358.95 (*id.*). The Comptroller of the Treasury, however, advised that nothing was due. The Solicitor of the Treasury gave the same advice. On the 26th of January, pursuant to the Comptroller's revision, "said auditor canceled the certificate thereto made by him, and certified that *there was nothing due to said Parish on account of said claim.*" Thereafter the Secretary of the Treasury on the 31st of May, 1904, "did determine and

ascertain and state that under the said rule and evidence *no balance is due to said Parish on account of said claim.*" (Rec., 262.)

II

THE BILL TO ESTABLISH A LIEN

The bill in this cause was filed to establish a contractual lien. The illegality of the contracts under which this lien is claimed, and the features thereof which determine the illegality, will be discussed in another place. At this place it may be best to confine attention to what the contracts of complainants obliged them to do; and the reasons assigned in the bill, for failure to fulfill, or attempt to fulfill their obligation. By a contract of August 4, between Joseph W. Parish and Jonas W. McGowan, the latter engaged "to prosecute and *collect* the claim of the former against the United States for ice furnished the army." In consideration of professional services, "in the prosecution of the said claim," the latter was to receive a fee equal to 15 per cent of the recovery. McGowan "agrees to diligently prosecute said claim to the best of his professional ability to its final determination" (Rec., pp. 2 and 3). The 3rd of December, 1902, McGowan assigned one-third of his prospective fee to E. V. Brookshire. On January 20, 1903, Parish entered into an agreement with Brookshire which, as stated in the bill, begins: "For value received and for legal services heretofore rendered and to be rendered." When the contract was offered in evidence, it was seen that the true word was not "*heretofore*," but "*hereafter*," which was admitted to be in the handwriting of Brookshire (*id.*, 189). There is then recited the reference of the claim to the Secretary of the Treasury; the finding of the Auditor for the amount due Parish, and on the 31st of May, 1904, the final refusal of the Secretary to give effect to said award (*id.*, 5 and 7).

It is then averred (5th paragraph) that complainants advised with Parish in respect to steps to obtain payment of the claim, and had especially under advisement the expediency of filing, in the Supreme Court of the District of Columbia, a petition for mandamus to compel the Secretary to issue a draft to Parish for the amount of the award in his favor, "and were still considering, and still had under advisement the filing of a petition for the writ of mandamus as aforesaid, and were awaiting the return of the said Parish to the said District of Columbia from which he had been absent for some time until the time of his death, which occurred on the 26th day of December, 1904." It is charged in the same paragraph that both complainants, from time to time, advanced to Parish, "for the benefit of himself and his family, various sums of money, amounting in the aggregate to the sum of \$5,000, relying solely upon his promise to repay the sums so loaned out of what might be recovered in respect of said claim."

The 7th paragraph alleges; that "*well knowing that complainants were ready and willing to render their services for the further prosecution of said claim, the defendant, Emily E. Parish, executrix, as aforesaid, employed other counsel and attorneys without consulting with or advising complainants, for the further prosecution and collection of said claim.*"

In the 8th paragraph, it is alleged complainants "*are informed and believe, and on information and belief aver, that it is the expressly declared intention, will, and purpose of the said Emily E. Parish, her agents and attorneys to ignore and refuse to recognize the lien and claim of our complainants in and to the said fund of \$181,358.95, created and established in and by the contracts and agreements herein before mentioned and set forth; and by the valuable and indispensable service of your complainants, rendered in the prosecution of said claim.*" That "the estate of said Joseph W. Parish is, except for the

claim above mentioned insolvent." (That claim which had just been vindicated by this court of itself established solvency.) It is averred that none of the claims against the estate have been paid in whole or in part, and "Your compainants *are informed and believe, and on information and belief aver*, both Emily E. Parish and Grant Parish are insolvent, and if they receive into their hands the draft or the proceeds of the draft about to be issued by the Secretary of the Treasury, they will immediately take the same out of the jurisdiction of this court, for the purpose of defrauding complainants of their rightful *lien* and claim on said fund." The defendant's counsel find it difficult to understand how the counsel of complainants could obtain their own consent to state in their brief (p. 33): "No one of the allegations of fact thus set forth in the bill is the subject of any conflict or dispute in the testimony, except that there is a denial by the appellee that she intended to take the proceeds of the draft about to be issued in payment of the award, out of the jurisdiction of the court." The fact is diametrically the reverse. Not one of the averments under oath on which an injunction was sought was sustained by a word of proof. The complainants did not have the temerity to go on the stand to prove a single one of them. The "*information*" on which these averments under oath were made still awaits proof. The irresistible inference is that the complainants did not possess the information which they swore they did possess. In her answer the defendant, in response to said 8th paragraph, "denied, that it is the intention, will and purpose of said Emily E. Parish, her agents and attorneys to ignore and refuse to recognize any valid claim against the estate of her testator; denies that none of the claims filed and proved against the estate in the Probate Court have been paid in whole or in part, but on the contrary avers that all such have been paid and satisfied; and in

consequence her account passed and approved. She denies that she is insolvent, and denies that her brother is insolvent, and as to the last sentence of said paragraph she says that a sum more than sufficient to satisfy the alleged claims of these complainants is now in the custody of the Court to await the judicial determination of the validity of the claims alleged; but she again denies that complainants have a "rightful lien and claim to and on said fund" (*id.* 20.).

Complainants who were under contract to prosecute their client's claim "to its final termination," and who unquestionably did no such thing, evidently felt the need to justify their prolonged inertia. Therefore they aver that they "had *especially* under advisement and consideration the propriety and expediency of a petition for the writ of mandamus to compel, &c., "and were awaiting the return of the said Joseph W. Parish to the said District of Columbia from which he had been absent for sometime until the time of his death, which occurred in the city of Washington on the 26th day of December, 1904." Of this fact they offered no word of proof for the simple reason that it was not the fact. As shown by the proof Parish was not absent a single day between the decision of the Secretary and the day of his death. That is to say there was no truth in the justification which complainants averred under oath; and complainants made no attempt to prove it. This is the reason assigned in the 5th paragraph of the bill for the failure to file a petition for the writ of mandamus. The issue is clean and clear. From the averment of the bill but one conclusion can be drawn, viz., that complainants had failed to file a petition for the writ, because they "were awaiting the return of Joseph W. Parish to the District of Columbia." No dissatisfaction, no impatience with them, none by them is hinted. The need to assign a reason for their nonaction is thus acknowledged, and the only reason given is that pleaded in said paragraph. The

defendant was summoned to controvert this (and no other) justification for delay to prosecute a remedy prior to the death of J. W. Parish. This was a material averment upon which the Court was called upon to act. "Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises for otherwise *he will not be permitted to offer or require any evidence of such fact,*" Story's Equity Pleadings, Sec. 28. The decree in the case must be *secundum allegata*. The defendant, as a witness, is asked, "Between the 31st of May, 1904, and the 26th of December of that year, was your father absent from the city of Washington?"

A. "He was not."

Q. "Was he continuously here during that entire period?"

A. "He was."

This is the uncontradicted testimony. The ground for the failure to file a petition in mandamus (and the ground on which issue was joined) is shown to have had no existence.

Morey is asked: "Do you know whether Mr. Parish was out of the city between May 31, 1904, and the time of his death to your knowledge?"

A. "Not to my own knowledge" (*id.*, 49).

Brookshire testifies: "Mr. Parish ceased to come to our office sometime after the middle of August" (*id.*, 72). As will be shown conclusively, there was excellent reason why Parish should have ceased to come to the office of either complainant after July 20.

"It is a general rule in equity pleadings, that every ultimate fact essential to the plaintiff's right to maintain the suit, and obtain the relief prayed for, must be stated positively, and with certainty, accuracy, and precision, in the bill; and relief will not be granted for matters not averred in the bill, *although they may be apparent from*

*other parts of the pleadings, and from the evidence in the cause. * * ** It (the bill) must show with certainty, accuracy, and precision that *all the plaintiffs have an actual existing right to, or interest in* the thing demanded or the subject matter of the suit, and that they have a *present right to institute the suit.*"

Bates on Federal Equity Procedure, Sec. 127.

The rule of equity does not differ, in substance, from the rule at common law, viz., that "whatever circumstances are necessary to constitute the cause of complaint" or the ground of defense must be stated in the pleadings. Chitty on Pleadings, p. 236, "*If the evidence differ from the statement the whole foundation of the action fails, because the action is entire in its nature, and must be proved as laid*" (*id.* 312.)

OBJECTIONS GOING TO THE COMPETENCY OF COMPLAINANTS' PROOF.

At the threshold of this discussion it is proper to advert to the incompetent character of the bulk of the proof offered by complainants as proceeding from parties who are here claiming against the decedent's estate. (Testimony) (*id.*, 25.) Objection was promptly made to this proof (*id.*, 28 and 47.)

In the course of the testimony of Morey it appeared that he was jointly interested with Brookshire in any recovery which might be had. Objection was then made to his competency to state "any transactions between Mr. Brookshire and Mr. Parish, or Mr. McGowan and Mr. Parish, or himself and Mr. Parish" (*id.*, 54; Dist. Code, sec. 1064). Similar objection was taken to Serven's report of conversations between himself and McGowan (Rec., p. 91), on the ground that to admit this were to allow complainants to make testimony for themselves. Sub-

ject to this preliminary objection and exception, the proof offered by complainants will be examined as if the same were competent.

III

The Pleadings in a cause are the judicial means investing a court with jurisdiction to hear and determine the controversy. What is nonapparent in the pleading is nonexistent for the trial. The intrusion at the trial of a wholly different justification for delay from that stated in the Bill; and the utter abandonment of that which was stated in the Bill, violated this principle of pleading and of justice.

In face of the emergency created by the answer, complainants sought to revise averment by proof at variance therewith. In place of absence from the city, "*Evasion*" while in the city was sought to be shown. Morey says: "I made appointments with Mr. Parish myself at our office, and he would not keep them. I would go to places where he was in the habit of going and leave messages for him, &c. We were endeavoring to have a conference with him for the purpose of taking definite action with reference to the further prosecution of the claim." (Rec., 34). Brookshire further testifies that in September he met Parish on a street car and told him that McGowan, Morey, and himself desired an interview with him (*id.* 72). At that date McGowan, to the knowledge of Parish, was in Dudley, Ontario (*id.*, 89).

On Sunday, October 9, 1904, Morey wrote Parish: "I called at your house today, but failed to find you. I am extremely anxious to see you, as *I have some very important news concerning your case.*" As to which he said in his testimony: "I have no comment to make in reference to this letter, as nothing occurs to my mind at the present time" (Rec., p. 114). This was not a message that counsel wished to see him, but that Morey (not

his counsel) wished to give him "very important news." If Parish exhibited no eagerness to hear the "important news," Morey had no cause to complain, and Morey cannot now recall anything that Parish would have gained by going.

The partner of McGowan gives a quiet negative to the doctrine of "evasion." Following the Secretary's decision, Serven says: "My recollection is that he (Parish) was in the office just about the same as he had been before that" (Rec., p. 87). "When did Mr. McGowan leave town that summer?" A. "I should say about the middle of July and from that on up to the 20th * * * That was the first summer he went to Dudley, Ontario" (*id.*, 88).

When the complainants averred first the absence of Parish from the city, then sought to prove in contradiction thereof, his evasiveness in the city, as the cause of their nonaction, they had in their hands the written evidence of their own acknowledgement, that neither absence of Parish from the city; nor his inattention to counsel when he was in the city, was the cause; but exclusively their confessed inability to think of anything which could be done for their client. The trouble was not that Parish "*evaded*" complainants, but that the remedy for the Parish case *evaded* them.

The defendant possessed the copy of a letter written by her father to McGowan, which enabled her counsel to call for the original. This was produced, offered in evidence by *the counsel of complainants*, and is as follows:

IV

Proof of Abandonment of Case by Complainants at Least as Early as July 20, 1904.

Prior to the 20th of July, 1904, McGowan verbally made the statement, set down in black and white, in the following letter (*id.*, 89-90).

"COMMITTEE ON CLAIMS,
 "HOUSE OF REPRESENTATIVES, U. S.,
 "WASHINGTON, D. C., Sept. 15, 1904.

"Hon. J. H. McGOWAN.

"MY DEAR SIR AND FRIEND: Your letter of 25th ult. received in due time and contents noted, which I answered best I could, but have no answer thus far come to hand and will repeat in substance I wrote, to wit: You will remember before you left Washington for your summer respite, you said substantially 'that you had done your best to get Auditor's report in my case paid by the Secretary of the Treasury and failed, etc.; *that you turned over to me the case to be managed in the future and do whatever I deemed best, etc.*' "

"Sometime next Congress I propose to organize a practicable method and resurrect the claim from its unfortunate condition and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore, I said that I would reimburse those who have advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit, 'that you would be glad and well satisfied to get the money advanced me' returned. My past record as to compensation, who had rendered me service, you have not surely forgotten, which was generous, and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm, who is doing business here and in New York.

"Yours hastily,

"J. W. PARISH,
 "217 A St. S. E."

The explanation of the failure to further prosecute the claim is this admission of inability to discover a way to do so.

No answer having come to a previous letter, Parish puts down in black and white for a second time the words used by McGowan prior to July 20, 1904, and sends these to him. Restoring to the first person what

is herein the second, what McGowan said was: "I have done my best to get Auditor's report in your case paid by the Secretary and failed, &c., and turn over to you the case to be managed by you in the future and do whatever you deem best." Through the medium of no form of words could abandonment be made more explicit. Serven says: "*My best recollection is that those letters were delivered at our office, and that I opened them and forwarded them to Judge McGowan, and asked him what, if anything, he wanted done about them*" (Rec., p. 87). McGowan's partner asked what should be done about it. To Parish McGowan made no reply; to Serven gave no instructions. McGowan was told that by reason of this retirement of his counsel from his case Parish, of course, would make new arrangements. If McGowan had contradiction to give then was the time to give it. McGowan never did, to Parish, in anywise, repudiate the statements in this letter of September 15, 1904. They were uncontradicted then; they are incontrovertible now. The proof of abandonment is conclusive. There is more: You said to Brookshire, Parish writes (again in quotation marks), "that you would be glad and well satisfied to get the money advanced me returned." This also receives acquiescence, as does the natural sequence of the foregoing: "I must have unrestricted and unrestrained control." That the statement in this letter is the repetition of what had been said in a former letter, also received acquiescence. No word ever came from McGowan in denial of the words attributed to him.

The foregoing, it is submitted, tends to negative the conclusion stated by the trial Justice, "that the failure of the plaintiffs to proceed in some manner to the collection of the claim was due to the attitude taken toward them by the decedent during the last months of his life." The additional words, "and by his executrix after his death" (Rec., p. 222), will be considered hereafter.

"We think," the learned justice says, "that if they (complainants) had been fairly and frankly dealt with they would have gone on as their best judgment directed in the prosecution of the claim" (*id.*)

Did not Parish "frankly and fairly deal with" McGowan in submitting (for correction, if correction could be made) words of the latter by which the former necessarily was governed? Parish does not reproach McGowan, as well he might, for this abandonment of a cause at the most critical moment. There is no word in this letter of which complainants can complain; no word of resentment for such desertion at such a time. Nothing could be more kindly.

V

Counsel of complainants in their brief urge that the complete abandonment by McGowan, and complete turn over by him to Parish, could not affect Brookshire (Brief, p. 100.)

In his letter Parish was not engaged in making the record for a case (which he could not have anticipated), but merely engaged in the presentation of facts, which, if not true, could be easily corrected. So engaged, he added this: Furthermore, I said that I would reimburse those who have advanced money to promote the case thus far; and will do very much better for you *than you expressed yourself to Mr. Brookshire, to wit*: "That you would be glad and well satisfied to get the money advanced me returned. My past record as to compensation—who had rendered me service—you have not surely forgotten, which was generous." The glad satisfaction to receive "the money advanced" was the cheerful relinquishment of any money on any other account. The natural import of this is that Brookshire was present at the interview whereat the further conduct of the case was relinquished by the attorneys, and that Mc-

Gowan as spokesman turned to Brookshire to make this statement, and that the latter interposed no demurrer, but united with McGowan. Moreover, if Brookshire was ignorant of this letter, and did not join his own acquiescence to McGowan's, why did he not say so after this letter had been produced in evidence by the counsel of complainants? This letter was offered in evidence on March 23, 1910. Mr. Brookshire was on the stand as late as November 14, 1910—more than seven months afterwards.

According to the testimony of Morey, when the subject of the employment of Brookshire was broached, Parish stated, that such employment "would be subject to Mr. McGowan's approval" (*id.*, 25.).

When, subject to the approval of McGowan the contract of Parish with Brookshire "for legal services '*hereafter*' rendered," was subscribed by Parish, this addendum was added: "Said Brookshire agrees to render necessary and proper legal services in the prosecution of the above described claim," *in the future under the direction of said Joseph W. Parish.*—E. V. Brookshire (*id.*, 28). This then was a contract subject to the approval of McGowan; and expressly existing under the direction of Parish; virtually a contract at the will and sufferance of Parish, who was to prescribe, determine, and control. The dissolution of this contract did not necessarily call for the assent of Brookshire. But if, as is the fair implication, he was present and acquiesced, he assented. When, after the production in proof by the counsel of complainants, of the paper of September 15, he uttered no word of repudiation, disapproval or dissent, he again assented. Finally, McGowan and Brookshire were associate counsel. Notice to either was notice to both. Notice to the leading counsel pre-eminently so.

In view of this record what is left of the specious pretexts for failure to file a petition for mandamus? Here we have Parish standing face to face with McGowan to

receive from the latter final sentence upon his case. If there was cause to complain of Parish for absence from the city, or inattention to counsel while in the city, why was no reference thereto made by McGowan in the act of ending his connection with the Parish case. Some reference should have been made to that purposed petition for mandamus which was "awaiting the return of the said Joseph W. Parish to the District."

VI.

McGowan's Reception of the Attorney Who Was Expecting to Supersede Brookshire and Himself.

In pursuance of the purpose expressed in his letter of September 15, Parish carried his case to Thomas H. McKee. McKee says: "I asked McGowan what the status of the case was and who the attorneys were of record. As near as I remember, it was five years ago; he answered this: '*That he had prepared it and followed it up to the time it was rejected in the Treasury Department, but, he said, 'I don't care who collects it, I want my fee out of it'*' (Rec., p. 120). The plain English of this is that since the rejection of the claim in the Department McGowan and his associate had not followed it, and were not proposing to do so. McKee is asked:

"Q. If in that conversation McGowan made any remark to you indicating what his purpose was as to the further prosecution of the case—whether he did or did not intend to prosecute it further?

"A. My recollection is that that matter did come up in the conversation. About the only thing that I remember distinctly about it was the statement on his part that *he did not care who continued the case.*

"Q. *He didn't say, then, that he did or did not intend to prosecute the case?*

"A. No" (*id.*, 178.)

McKee had said to Parish: "I wouldn't think of taking it without consulting Mr. McGowan" (*id.*, 179), and then went to McGowan to ascertain whether objection could be made to McKee's taking the case. McGowan said, in effect: "No objection can be made to your taking the case." It was a time for McGowan to be explicit or else forever afterward to hold his peace. Then was the time to say: "I and my associate are the attorneys in this case, ready, willing, and anxious to continue it to a final determination," and this was only a few days after the death of Parish (*id.*, 178), when it was peculiarly appropriate to acquaint the daughter that she had counsel under contract obligation to serve her interests, and who proposed to do so. One who felt under the obligation of contract to continue the litigation to the end should have so stated to McKee, who was evidently ready to accept McGowan's view on the subject, and not waited to say so to the daughter, through the medium of a bill in equity, after the case had been gained by others.

McKee, having stated that he called at the Parish house after the funeral, is asked by complainants' counsel to state what took place:

"A. It is pretty hard for me to recall. They were in mourning, of course, as it was immediately after his death, and the conversation for a long time that evening turned upon the life and character of Mr. Parish. It was a while before we got to the question, and my recollection is that *there was not much said about it*, only that I suggested to them, and we attempted to carry it out afterward, that we go to Judge Cole's office.
* * * There was not very much said. * * *
I had but *one* interview with the lady.

That was at her home, the evening, I think, after the funeral (*id.*, 179). Counsel for complainants state (Brief, p. 23) that in answer to the question: "Were the former

attorneys Mr. McGowan and Mr. Brookshire, mentioned?" he replied: "O, I think so. I think I talked freely about them." McKee did say this, but enlightened it by the following reply to Mr. Darlington: "Q. Do you recall that either on the occasion of this interview with Miss Parish and her brother, or some subsequent interview, Mr. McGowan's connection with the case was referred to?" "A. No. I do not think I could say, positively, that his name was mentioned. You see, I had but the one interview with the lady" (*id.*). McKee is asked: "Do you recall the name of any attorneys being mentioned in that interview?" "A. No. Not unless it was Judge Cole. I mentioned Judge Cole" (*id.*).

Miss Parish is asked by Mr. Darlington:

"Q. Didn't you send for McKee the day after the funeral?

"A. I did not send for him. Mr. McKee called on me not the day after, but several days after.

"Q. And you discussed the ice claim then with him?

"A. I haven't any recollection of it. Mr. McKee called to pay a visit of sympathy, and I haven't any recollection that we did.

"Q. Is your recollection vivid enough and strong enough to enable you to say you did not?

"A. I say I haven't any recollection of talking about the ice claim. I was too distressed to talk about business, and if he mentioned it to me I do not remember" (*id.*, 151).

Subsequently McKee testified: "Grant Parish came to me and demanded the papers, and I said, 'You can't get the papers unless your sister, who is the administrator, sends me a written request for them and she did. McKee realized that he had no right to deal with Grant as the agent of his sister. In the act of relinquishing all prosecution, "diligent" or other, McGowan, in law and logic, relinquished all claim to what was only due upon such "prosecution of said claim."

The dialogue with McKee brought home to McGowan, and his associate Brookshire, that Parish (acting, as he said he would, on the *abandonment* by counsel, so clearly communicated to him), had selected their successor. Beyond cavil, the conclusion to which Parish had arrived, then and there received the sanction of McGowan. In the most unequivocal manner, McGowan was notified, that Parish had already proceeded to act on the declaration, quoted for the second time, in the letter of September 15, 1904; and certainly McGowan said nothing to arrest the procedure. Nothing could be clearer than the estoppel, thereafter, to contradict the conclusion. The alteration in his conduct by Parish was caused, and naturally caused, by reliance upon the representations made to him by McGowan.

VII.

Complainants estopped to deny their abandonment of the Parish Case. If a party, by his silence, allows another to act upon a mistake of facts, even where there is mistake, he is thereby estopped from setting up those facts afterwards to the prejudice of the person who has been misled. His silence binds him upon the same principles, as if he had by express misrepresentation misled the other parties. Hence, were it the fact, that McGowan did not use the words he has never denied, his silence binds him to them.

"If whatever a man's real intention may be, he so conducts himself, that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it as true, the party making the representation would be equally precluded from contesting its truth."

Freeman v. Cooke, 2 W. H. & G., 663.

"As a general rule a party will be concluded from denying his own acts and admissions which were ex-

pressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter."

NELSON, J., in *Welland Canal Co., v. Hathaway*, 8 Wend., 483.

The principle "proceeds upon the ground that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. He is not permitted to deny a state which by his culpable silence or misrepresentations he has led another to believe existed, and who has accordingly acted upon that belief."

Morgan v. R. R. Co., 96 U. S., 720.

"What I induce my neighbor to believe is the truth as between us, if he has been misled by my asseveration," *Kirk v. Hamilton*, 102 U. S. 76. "He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others acted" (*id.*, 79.).

"Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." *Casey v. Galli*, 94 U. S., 680. To hold otherwise would be contrary to the plainest principles of reason and good faith, and involve a mockery of justice" (*id.*).

"The doctrine of Estoppels *in pais*, or by the act of the party, is founded in natural "justice," and is a principle of good morals as well as law" * * * No one is permitted to keep silent when he should speak, and thereby mislead another to his injury."

Gregg v. Von Phul, 1 Wall., 281.

"The equitable doctrine of acquiescence applies in full force in this case. It has been well defined as quiescence under such circumstances, that assent may be reasonably inferred from it. *Assent thus given is as irrevocable as if expressly stated in words.* * * * Assent is a necessary inference from acquiescence, and *estoppel was the necessary consequence of assent.*"

Lowndes v. Wickes, et al., 69 Conn., 30-31.

VIII.

The letter of McGowan, Morey, and Brookshire of November 19, 1904, to J. W. Parish, was a letter to add insult to injury.

McGowan had returned to Washington just before October 1, 1904. The last communication between attorney and client was the client's letter of September 15, 1901, which had remained unanswered. It was McGowan who was in default. Since his return he had written no word, nor had anybody for him, to say that he wished to see Parish for any reason. A letter from Morey had stated that Morey was anxious to see him for the purpose of giving "some very important news," but said nothing about McGowan. The last letter from Parish to McGowan, that of September 15, was as frank and friendly as McGowan could desire, and more so than he had a right to expect. There was no reason why Parish should further visit the offices of those who had disclaimed all further responsibility for him or for his case. McGowan had good cause to be content. He had been suffered to relieve himself of all further responsibility for a case he had contracted to prosecute to a final determination. Now, however, the quietude of Parish would seem to have excited a suspicion that most unexpectedly he had found a way. Without any disavowal of the words quoted in the letter of September 15 complainants evidently deemed

it judicious to see Parish again. The first move was to allure him by the prospect of "very important news." This not having the desired effect, a more imperious mis-sive was concerted. Morey is asked:

"Q. Did you ever write to Mr. Parish after Secretary Shaw's decision, on the subject of that decision, and on the future course to be pursued?

"A. I may have done so; but if I did, I do not recall it now.

"Q. Do you know of your own knowledge, not from hearsay, of either Mr. McGowan or Mr. Brookshire's doing so?

"A. Nothing further than that letter of November 19.

"Q. That was between the time of the adverse decision and the time of Mr. Parish's death, which was the 26th of December, 1904. You have stated now everything, as far as you can remember, that was said or done by you or your associate counsel in this matter with reference to any further action that was taken in the case?

"A. As far as I recall I have stated what I know" (Rec., p. 49).

Here, then, follows the one letter from either of complainants between the Secretary's decision and the death of Parish relating to the course to be pursued. McGowan's words of abandonment not having been written in a letter by him, but quoted from him in the letter of Parish:

The letter addressed to Parish, at his residence in this city, is singular, as coming from complainants, who to excuse their own dereliction, swore, in their bill, to the absence of Parish, after the Secretary's decision to the day of his death.

"NOVEMBER 19, 1904.

"MR. J. W. PARISH,

"217 A St. S. E., City.

"DEAR SIR: We have done what we could to secure an interview with you concerning the ice claim. You have deliberately advoided us. The time has come when the

matter should have attention. If we do not see you on or before Wednesday next, *we shall proceed as we deem best under the ample authority which we have.*

"Yours truly,

"J. H. MCGOWAN.

"E. P. MOREY.

"E. V. BROOKSHIRE."

The letter must have been expected to inflame and could have had no other result.

If McGowan felt a desire to see Parish he did not feel it strong enough to drop a line to him to that effect, nor had he once called at the house. If the two had not met, Parish had no more avoided McGowan than McGowan had avoided Parish. As already stated in respect to communication, it was McGowan who was in default. The words spoken by McGowan and twice repeated to him by Parish rendered further interview needless. The letter states: "The time has come when the matter should have attention." That time had come several months earlier, but some four months prior to this letter of November 19 had been expressed the conclusion of counsel that further attention would be fruitless. The letter concludes: "If we do not see you on or before Wednesday next, we shall proceed as we deem best *under the ample authority we have.*" Why, then, after "*Wednesday next*" did they not proceed, and as they did not need the interview for "authority," already "ample," to proceed, why did they write this gratuitously offensive letter? There is no sign that *what "we deem best"* was ascertained at any time prior to the decision in *Parish vs. MacVeagh*, 214 U. S., 124, decided May 17, 1909.

In this letter of November 19 there is no word in repudiation of the words attributed by Parish to McGowan in the letter of September 15, 1904; no disclaimer of them in whole or in part. *These words remained then, remain now, the uncontradicted words of abandonment.*

Nothing had happened to justify this letter. While McGowan was in Canada, letters entirely amiable had passed from Parish to him and from him to Parish (Rec., p. 89). What could have been the motive for this deliberate and coarse affront? The nearest approach to explanation is found in the brief which has just been filed by the counsel of appellants (Brief for appellants, pp. 97-8), wherein is stated: "Certainly the right of the attorneys, sought to be asserted in this suit, were not lost as against either Mr. Parish or his estate by *their failure to attempt to proceed further, after receipt of his reply to their foregoing letter of November 19.*" Here then is discovered a third ground of justification for the failure of complainants to take action, bearing date November 22, 1904 (Rec., 35), the date of the reply of Parish—a justification not hinted in the bill. They did not know when they filed their own opprobrious sheet, that the executrix had in her hands the copy of her father's letter, showing the abandonment of him and his cause, four months earlier. When McGowan sent the letter, he perfectly well knew he had in his files a communication showing that letter to be an unjustifiable impertinence and outrage. Parish replied in kind (*id.*, 35). Naturally, it incensed him to be threatened with some dire consequence, if he did not instantly obey the beck and call of them, who had dissolved all business relations with him. As there is nothing else in the record which smacks of asperity on the part of Parish, it must have been this reply of November 22, 1904 (not quite five weeks before the death of Parish), to which the trial justice refers as "the attitude taken toward them (the complainants) by the decedent during the last months of his life." But this letter could not possibly have caused the *abandonment* which had been put in writing more than two months earlier; put in words more than four months earlier, and proved by the paper produced from McGowan's files.

IX.

Complainants should not be heard to aver as they do in paragraph 7; that "well knowing that complainants were ready and willing to render their services for the further prosecution of said claim the defendant Emily E. Parish, Executrix, as aforesaid employed other counsel, &c." When, undoubtedly, complainants were "well knowing" of the letter of her father in the files of McGowan, explicitly stating their unreadiness and unwillingness to render services for the further prosecution of said claim." As according to the averment of the bill the reason of complainants for not filing a petition for mandamus after the death of J. W. Parish was the adverse attitude of his daughter, what was her attitude to them, and their attitude to her?

The executrix says in her answer that "from May 31, 1904, when payment was refused by the Secretary of the Treasury, to the 2d of May, 1906, when her mandamus suit was filed, the said complainants did not, nor did either of them, ever impart to this defendant their readiness or willingness to institute a mandamus suit or any other suit for the enforcement of her right." *Of this there is no contradiction.* In her testimony she was asked:

"Q. After your qualification as executrix of the will of your father, did you at any time receive any communication from either of these gentlemen—either Mr. McGowan or Mr. Brookshire?

"A. *I never did.*

"Q. Did either of these gentlemen, to your knowledge, ever call to see you—either Mr. Brookshire or Mr. McGowan?

"A. No, sir."

On cross-examination the defendant stated that she did not remember to have seen McGowan after October, 1903 (Rec., p. 133).

"Q. Did you ever receive from them, in any form, any information or statement as to their employment by your father for the prosecution of this claim?

"A. I never did.

"Q. *Did either of these gentlemen, after your qualification as executrix, either directly or indirectly and in any form offer to continue the prosecution of this claim against the United States?*

"A. *They did not.*"

The foregoing is wholly uncontradicted.

"Q. Have you at any time since your father's death been insolvent and unable to pay your debts?

"A. No, sir; I have not.

"Q. Have you ever intended at any time, if you should receive the amount that was due from the United States on account of this claim, to take it outside of the jurisdiction of this District?

"A. No, sir" (*id.*, 117).

The defendant is asked:

"Q. When did you first learn of a contract between your father and Mr. J. H. McGowan, dated the 4th of August, 1900?

"A. My first hearing of it was when this bill was filed.

"Q. I ask you the same thing as to the contract between your father and Mr. Brookshire, the 20th of January, 1903?

"A. I first heard of that contract at that time" (*id.*, 116).

This also remains wholly uncontradicted.

"Q. State if you had ever heard of any contract between your father and either of these two gentlemen as to their employment in the prosecution of this claim prior to the filing of this bill?

"A. No, sir; I never heard of any contract" (*id.*, 116).

"Q. Did you know during your father's lifetime that these gentlemen were engaged in the prosecution of his claim against the Government in this ice matter?

"A. Yes, sir; I know they were his attorneys" (*id.*).

On an examination-in-chief, covering not quite three pages, the defendant was subjected to a cross-examination covering forty-four pages. But not in this stringent cross-examination nor by the testimony of others are her statements discredited.

It seems unnecessary to consider conversation of Morey with Parish in defendant's presence in the summer of 1903 at Harper's Ferry. The case was then in the Treasury Department. Morey says: "The case was discussed while we were out driving." The carriage contained Morey, his wife, J. W. Parish, and Miss Parish. Morey continues (*id.*, 5): "We discussed the scenery and the goats on the mountain side and the battle fields." This was not enough to disclose a contract to prosecute the claim beyond the Treasury Department to a final determination. It would not be enough, even if thereafter the contract had not been abandoned.

X.

Complainants attempt to prove a constructive notice of that of which no actual notice was received nor directly sought to be given.

No reply has been made, none attempted to be made, to the effect of McGowan's language of abandonment. No explanation has been given, none attempted to be given, as to the failure of complainants to utter one word, oral or written, on any subject, to the defendant from the day of her father's death to the filing of this suit. It is a fair conclusion that they did not so much as

attend her father's funeral. Instead of the direct approach, which would have been so simple (the United States mail being the safe conduit therefor), complainants offer in evidence sundry indirect approaches, which they seem to consider should operate as constructive notice of their pretensions.

In respect to what took place after the death of J. W. Parish, Morey is asked: "Did you have any interviews with her (i. e., the defendant)?" "A. No." (*id.*, 36). But he says the following occurred: "Shortly after the death of Mr. Parish I met Mr. R. Golden Donaldson, of the firm of Cole & Donaldson, on the street, and *he* informed *me* that his firm had been retained by *Miss Parish*, as *executrix*, and stated that *he* would like to have a conference between McGowan, Mr. Brookshire, and myself *looking to our location in the case*. *He suggested that we write a letter to his firm asking for an appointment, and stated that an appointment would be arranged, when we would have a conference, and arrange, for ourselves in the case in connection with its further prosecution*. At his suggestion, a letter was written and signed by McGowan, Mr. Brookshire, and myself and sent to Messrs. Cole & Donaldson. *We received no reply to that letter*. Mr. Cole shortly after that became ill and died. * * * The only thing we sent to Messrs. Cole & Donaldson was our letter asking for a conference. That was after Mr. Parish's death *and at the suggestion of Mr. Donaldson*" (*id.*, 36). "Even after the death of Mr. Parish a letter was addressed to Messrs. Cole & Donaldson, who were her attorneys of record, *offering our services*" (*id.*, 45). "Q. *Did Mr. Donaldson state to you directly or indirectly that the firm of Cole & Donaldson ever had been employed in this ice claim?*" "A. Yes, sir." Q. *He did?*" A. Yes, sir" (*id.*, 48). Soon after the death of Parish, Brookshire says: "Mr. Morey stated that he had met Mr. Golden Donaldson on the street, and he stated that the firm of

Cole & Donaldson would entertain a letter from us, with a view of having a meeting *for the purpose of arranging for us in the case*" (*id.*, 73). Serven says: "Mr. Morey came into the office one day and said that either Judge Cole or Mr. Donaldson, of Cole & Donaldson, *had stopped him on the street*. I think he said it was on the street, and told him that *the executrix* or Grant Parish had been to see them about taking up this case, and that *it had developed that Judge McGowan, Mr. Brookshire, and Mr. Morey were in the case*, and he wanted to talk things over about it" (*id.* 93).

As is shown by the testimony to be hereafter cited, the firm of Cole & Donaldson had never been retained by Miss Parish for anything. Their only appearance in relation to the estate of Parish was in the Probate Court at the instance of Mr. Jesse E. Potbury to ask for the probate of the will of J. W. Parish. Still less could they have been at that time retained by "Miss Parish, *executrix*," since her letters were not granted until after the death of Judge Cole, on March 17, 1905. Still less could Mr. Donaldson have stated that his firm had been employed in the ice claim, for the simple reason that his firm never was employed in respect to the ice claim. It is not explained how from anything in the Probate Court it could possibly have "*developed that Judge McGowan, Mr. Brookshire, and Mr. Morey were in the case*," and especially how it could have been manifested or "developed" that Morey (who had no contract of any kind with Parish) was "*in the case*"—the ice case, necessarily—so as to cause Mr. Donaldson, in his sense of the pressing importance arising from this "development," to stop Morey on the street to arrange for the relation of others to the case.

In view of the statement that it was "at the suggestion of Mr. Donaldson" that a letter was to be written by complainants, coupled with the assurance that upon receipt of it a conference would be arranged, whereat

complainants could "arrange for themselves in the case in connection with its further prosecution"; that it was not complainants who sought to meet Mr. Donaldson, but Mr. Donaldson who expressed this eagerness to meet complainants, the letter which follows is a *non sequitur* from the reported interview and dialogue:

"JANUARY 31, 1910.

"MESSRS. COLE & DONALDSON and JESSE E. POTBURY,

"Attorneys-at-law, Washington, D. C.

"GENTLEMEN: Having learned *from the court record* (not from conversation with Mr. Donaldson on the street or elsewhere) that you have filed a will of Joseph W. Parish, and have made application for the probate of the same, and asked for the appointment of Miss Emily Parish, executrix thereunder, we would respectfully ask, owing to the fact that we have also placed a will on file and hold contracts with and powers of attorney from Mr. Parish for the collection of his ice claim, that we may have a conference with you touching matters affecting said estate. If agreeable let the time and place suit your convenience.

"We remain, gentlemen,

"Faithfully yours,

"J. H. MCGOWAN.

"E. P. MOREY.

"E. V. BROOKSHIRE."

(*Id.*, 99.)

No reference is made to the fact that the letter is written "at the suggestion of Mr. Donaldson"; none to the fact that the proposition for a conference "looking to our location in the cause" was Mr. Donaldson's proposition. The information which prompted the letter is stated to have been derived from "the court records" and from no other source. Mr. Morey says: "*We received no reply to that letter.* Mr. Cole shortly after that became ill and died" (*id.*, 36). The letter was written

on January 31, 1905. Judge Cole died on March 17, 1905, after a very brief illness. In six weeks there was sufficient time for a reply by Cole or Donaldson to a letter which had been so particularly requested by a member of the firm. Messrs. Cole & Donaldson had not been employed to prosecute the ice claim. Appearance in the Probate Court of itself no more imported such further employment for them than it did for Potbury. But when complainants saw the signatures to the petition for probate they reasoned that this contemplated an employment for something more difficult. Morey calls the letter one "*offering their services*" (*id.*, 45). An *offer* of services is always an offer which may be declined. There is no intimation that anything in relation to the subject-matter of the letter had ever taken place between the writers and the addressees.

Mr. Donaldson, called by complainants, and asked about the conversation with Morey, answered: "I am sorry to say that I do not recall the conversation to which Mr. Morey refers." Shown the letter of January 31, and asked if that refreshes his recollection. "A. This does not refresh my recollection of having received this letter. * * * I cannot recall having received this letter. * * * No definite arrangements had been entered into with either Mr. Potbury or any of the Parish family in relation to the prosecution of the ice claim; but we had gone so far as to present a petition in the Probate Court for the probate of Mr. Parish's will" (*id.*, 97). "I simply have no recollection on the subject—*i. e.*, of the conversation with Morey (*id.*, 99). "Q. Did you know Mr. McGowan?" "A. I don't think I did, sir" (*id.*, 98). "Q. Did you know Mr. McGowan and Mr. Brookshire were ever connected with the prosecution of the ice claim of Mr. J. W. Parish?" "A. Well, I really do not know what connection Mr. McGowan and Mr. Brookshire had in the matter. I really do not know. *I do not know what if any connection they had*" (*id.*, 99). "After the death

of Judge Cole, I suggested my entire willingness to permit the parties to have other counsel if they so desired, and as a result of that I think all the papers were turned over to Mr. Potbury. * * * Whatever papers we did receive came from Mr. Potbury" * * * (*id.*, 100). "After the death of Judge Cole, which occurred on the 17th of March, 1905, I turned everything we had in the office over to Mr. Jesse E. Potbury. My understanding was that he was counsel in the case. *I think it was he who first brought the matter to our attention*" (*id.*, 97). At this date, some time after March 17, 1905, certainly six weeks and more after the letter of January 31, Mr. Donaldson was unaware that any one save Potbury represented any interest of the Parish estate. *Complainants propose that the letter which failed to inform the party to whom it was written should be held to have constructively informed the defendant of their pretensions.* The letter of January 31, 1905, was designed, Morey says, to be one "offering our services." What need had complainants to offer services *which had already been retained?* Why did they not by letter call the attention of defendant to that fact?

XI.

Attempt to Affect Defendant with Knowledge of Contract by Testimony of Potbury and Brookshire.

Mr. Jesse E. Potbury entered his appearance as a solicitor for the defendant in this cause on the 24th of May, 1909 (*id.*, 115). An order having been given by the firm of Cole & Donaldson for the withdrawal of their appearance in the Probate Court (October 23, 1905—*id.*, 201), Mr. Potbury attended to the statement and settlement of the final account of Miss Parish as executrix. For these services he had originally provided as his own compensation—first for representing the estate, \$3,000.00; second, for representing the three beneficiaries, Grant

Parish, Emily E. Parish, and the Young Men's Christian Association in this estate and in all matters connected with the estate, and also to act as retainer fee in representing said executrix and Grant Parish and the Young Men's Christian Association in the suit of *Jonas H. McGowan et al. vs. Emily E. Parish et al.*, now pending in the Supreme Court of the District of Columbia, and in any other suit or suits which may be filed against said executrix or the legatees herein named the sum of \$3,000.00 (*id.*, 183). Miss Parish did not object to the charge made for services to the estate, but did object to what seemed to her a second charge for virtually the same thing, the consequent benefit to the beneficiaries under the will, and for services in the future which might not be rendered. An arrangement was made whereby the additional \$3,000.00 was relinquished, and Mr. Potbury ceased to represent Miss Parish in all pending suits (*id.*, 182).

When Mr. Donaldson withdrew from all professional relations with Miss Parish he turned over to Mr. Potbury (the only one, so far as he knew, having such relations) all the papers in his possession bearing on her business, and as *the one* having such relations Potbury received them. When Mr. Potbury withdrew from all relations with the executrix certain confidential papers in his possession relating to her business were seen by his former associates for the first time, when they were produced by him at the summons of defendant's adversaries.

Called to give evidence in support of the contention of complainants, Mr. Potbury produced the letter of McGowan, Morey, and Brookshire, bearing date January 31, 1905. "Q. Did you communicate the contents of that letter by any one?" "A. I did not." This he amends by saying: "I either showed the letter or communicated its contents to Mr. Grant Parish" (*id.*, 103). He further produced a letter of professional confidence,

written by Grant Parish to Judge Cole, a similar letter written by Grant Parish to himself.

Potbury says: "I stated to him (Grant Parish) that I did not see how we could get over that contract"—*i. e.*, the contract with McGowan (*id.*, 110). The words would seem to contemplate Potbury as included in "we," and further that his mind was troubled as to how to get over a contract he had never seen which anxiety, however, did not diminish his exertions to do so. With his own hand he drew up the contract for the performance of that duty by Mr. Conrad (*id.*, 108). He went to several offices to employ the lawyers in them "to get over it."

He states he saw Mr. Darlington with a view to his employment and he was too busy (*id.*, 108). He next went to Judge Cole's office. "Judge Cole came in and said he was too busy to take it up at that time, but would make a later engagement. With that I placed all the papers in the hands of Cole & Donaldson" (for them to get over it) (*id.*, 109).

In the present suit the appearance of counsel for defendant was entered by Potbury as follows:

"Equity. No. 28561.

Filed May 24, 1909.

"The clerk of said court will enter the appearance of Holmes Conrad and Jesse E. Potbury as solicitors for the defendant, Emily E. Parish.

"HOLMES CONRAD,

"JESSE E. POTBURY,

"Attorney for Defendant,

"EMILY E. PARISH, *Executrix*."

(*id.*, 121).

Mr. Potbury had a conversation with Mr. Brookshire in front of the Loan and Trust Building.

"By Mr. CONRAD:

"Q. Did he express any opinion to you as to whether the remedy that I had employed was the proper remedy or not?" "A. The exact language he used at that time I do not remember, nor can I give the exact words; but it was, as far as I recollect, that they were on the wrong track, and the matter should be presented to the Court of Claims, or something like that."

"By Mr. ROBINSON:

"I understand that you stated that Mr. Brookshire said the proceeding which had been taken was on the wrong track?" "A. Something like that" (*id.*, 112). In view of the solemn averment under oath by complainants this repudiation of the subject of "*special advisement*" could not have been expected. At this date the former counsel of Parish had not determined what should be done in the prosecution of the claim.

Mr. Potbury testifies that he "either showed the letter (of January 31, 1905, from McGowan, Brookshire, and Morey) or communicated its contents to Mr. Grant Parish" (*id.*, 103). Grant Parish in a letter of February 2, 1905, to Judge C. C. Cole vented his indignation. On February 7 Judge Cole acknowledged receipt of the letter of the 2d, and says: "I am very much engaged at present, and will be unable to see you and your sister for about a week, when I will fix a time. I note what you say about an interview with Messrs. McGowan and others. *We will enter into no arrangement with them without first consulting you.*" Is this the letter Judge Cole would have written had he understood that "McGowan and others" had a paramount right in the premises, or the letter he would have written, if that of January 31 had been supposed by him to have been written in response to the request of his firm? If Mr. Donaldson had impulsively held up Morey, as testified, *should not and*

would not Judge Cole have acknowledged responsibility therefor?

Mr. Conrad asked Potbury: "*Did you ever tell me at the time of that contract (the contract Potbury drew for the employment of Conrad) (id., 111) that Mr. McGowan, Mr. Brookshire, and Mr. Morey were counsel in this case?*" "A. I did not, Major, because Mr. Parish employed you himself." "Q. In all your conferences with me about this matter, in the early stages of it, did anything occur to convey to your mind the impression that I knew that Mr. McGowan, Mr. Brookshire, and Mr. Morey were counsel in this case?" "A. You did not so state to me; neither did I advise you of it" (*id.*). So, through this source, Miss Parish was not affected with knowledge of the contract.

Brookshire was asked by Mr. Conrad: "Did you ever, at any time, offer your services and association with Mr. Robinson and myself in this suit?" "A. Why, Mr. Conrad, I did not feel that I could offer myself in the case" (*id.*). If he had a paramount contract, which made it a violation of contract for any other to be in the case, he need not offer, but demand that only by consent of complainants should the services of others be accepted. He knew of Mr. Conrad's employment as early as the 10th of February, 1906. Why did he not speak of the contract then to the executrix, so as to save the labor and expense of another's preparation for the trial?

The purpose of Brookshire in calling on Mr. Conrad is thus stated by the former: "I came there believing that you would think that the balance found due by the Auditor for the War Department was an *asset* that we had aided in creating, and that you would at least treat me with courtesy and *perhaps* solicit our co-operation when you knew that fact, as Cole & Donaldson had, I am informed, on a previous date" (*id.*, 177). If by his language Brookshire meant to say that Cole & Donaldson on a previous date, by reason of anything communi-

cated to them, had solicited the co-operation of McGowan and Brookshire the statement had nothing to support it. The purpose of Brookshire's visit was not to assert a contract which would put Mr. Conrad out, but apparently to assert merits which would tend to put himself in. The language of Brookshire in this dialogue is the plainest recognition by him of the abandonment wrought for him no less than McGowan, by the letter of September 15, 1904, and the subsequent interview with McKee. Brookshire came to Mr. Conrad, not to arrest, but to participate in the latter's employment; not to dictate, but to receive leave to co-operate, and that leave, not a matter of right in himself, but a matter of grace from Conrad.

The letter of Grant Parish to Judge Cole (produced by Potbury) refers to the fact that Messrs. McGowan, &c., have requested an interview with you and your associates, "*who will represent us in the Probate Court.*" I fully know the nature of this conference before it will take place. My father dismissed these lawyers for gross incompetency, having failed through their incompetency in forcing the Government," &c. This is inaccurate. J. W. Parish did not dismiss "these lawyers," but "these lawyers" dismissed Parish, or dismissed themselves from Parish. He continues: "My father had no intention whatsoever to allow them to re-enter the case again." It is immaterial what the father's intention was. The complainants once out of the case, Parish and his representatives were under no obligation to permit them to return, even if they evinced a desire to do so. The letter concludes: "Messrs. McGowan, Morey, and Brookshire chased after my father, and finally threatened him." It is not correct that these complainants "chased after" the elder Parish. They did the reverse; they abandoned him. But it is true they "finally threatened him." This senseless threat, if it was uttered with any other purpose than

to enrage, is that which incensed the sire in his lifetime and the son after his death.

This letter of Grant Parish could not possibly have interfered with the offer of the services of the complainants, since they could not have known of it *until it was produced for their benefit after the filing of the present suit and the separation of Potbury therefrom*. The letter of November 24 by the elder Parish did not (in their own judgment) preclude the further offer of their services. They did indeed waive all right to do so, or to suggest a right to do so, on the employment of McKee. But when they supposed that Cole & Donaldson had been employed to prosecute the claim which had been abandoned by themselves they wrote the letter, which they now claim was expected to call attention (not of the defendant, but of Cole & Donaldson) to the propriety of their own employment; that is by Cole & Donaldson, as associates. Judge Cole died March 17, 1905.

Brookshire says, "perhaps a month or two months after that he called at the office of Grant Parish" (Rec., p. 73) to tell him "that Mr. McGowan, Mr. Brookshire, and myself" were anxious to go on with the case. It is true Grant Parish, also called by the complainants, says: "Brookshire never told me he was willing and ready or anxious to continue in this case." Assuming Brookshire's statement to be correct, this call was made something like a year after the adverse decision of the Secretary. In that time no step had been taken or suggested by McGowan or Brookshire.

The call was made a little less than five months after the death of J. W. Parish. In that time not only no syllable on the subject had been spoken to the defendant, but no approach had been made to any member of her family. On the authority of cases to be hereafter cited, even had there existed a contract, and even had defendant known of it, this delay of complainants to take any step

of any kind, and failure during this long period to communicate in any way with the defendant, of itself, was tantamount to abandonment, and of itself would have justified the employment of other counsel.

For the purpose of making the defendant responsible for what was said by complainants to Grant Parish and by him to them, it was necessary to maintain that Grant was the agent of defendant. Grant himself, called by complainants, says he was not (*id.*, 61). The defendant was asked: "Has your brother, Grant Parish, ever been authorized by you to act as your agent in this matter?" "A. No, sir; he never has." "Q. *Has he ever been empowered or authorized by you to represent you in any matter connected with the administration of your father's estate?*" "A. No, sir." "Q. *To what extent have you in that matter used the services of your brother?*" "A. Well, I have asked my brother to take messages and he has done so" (*id.*, 118). As has been shown, McKee had no doubt as to the true state of the case when he said to Grant, "You can't get them (the papers) unless your sister, who is the administrator, sends me a written request for them, telling me to deliver them to you" (*id.*, 180.)

XII.

Appellants estopped to set up the pretension, that they communicated with Grant Parish as the agent of appellee, or were governed by communications from him, on the hypothesis he was such agent.

The evidence introduced by complainants shows that in good conscience, they could not use Grant Parish as the agent of, or a responsible medium to communicate with, his sister. Serven, the partner of McGowan, testified, as witness for complainants: "Mr. Parish (*i. e.*, J. W. Parish) in my office, one day, said to me, that Grant had certain times in every month when he was not quite right in the

head; that he had either had a fall or a sunstroke, when he was a child, and that in certain phase of the moon his head was always affected, and he would do things that he ought not to be held responsible for. He referred to attempts which Grant had made with him and also to attempts of Grant made with the Judge to make the Judge angry in order to try to get him out of the case. Judge McGowan had told me the same thing—that Grant had tried in every way to get him out of the case" (Rec., p. 92).

It seems to have been conceived, in McGowan's office, that the way to get counsel out of a case (and more strangely for counsel to be retained in a case) is by exciting anger. They offered in evidence a letter of J. W. Parish to McGowan, dated September 29, 1903, in which the writer says: "I think until Grant is soundly 'side tracked' he will be liable to act as a lunatic, 'as he surely is'" (*id.*, 131). They also offered this of October 25, 1903 from J. W. Parish to McGowan in which is said: "Grant is in no sense in a fit state of mind to take part in what is and should be done. His warped mind and injudicious temper inspired by Satan, unfits him to do justice to anyone" (*id.*, 148). The production of these letters was deeply mortifying to the defendant as well as to her brother. By her, or on her own behalf, they would never have been offered. It is with regret, that counsel for appellee, feel it due to her cause, to point in the brief she will read, testimony so mortifying to her and to her brother. It is the proof forced upon appellee by complainants. They come before you asking you to accept their alleged offer of renewed service through Grant Parish (the fact thereof being controverted by Grant himself) as the sufficiently explicit tender of service to the sister.

The conduct of complainants is especially peculiar in this; that in choosing, as is avowed, as organ of communication, a brother shown by themselves to be hostile,

they ignored another brother shown by themselves to be friendly.

James Parish (by a typographical error printed in the record, Joseph H. Parish) died in Chicago January 10, 1908 (Rec., p. 185). Serven says: "I think when Judge McGowan was in Congress, Jim Parish had been a stenographer, he had done some work for him, and I think later had been employed in the Judge's office, and their relations were very friendly. Jim Parish, through correspondence, had kept fairly closely in touch with the progress of this case" (*id.*, 94). In the latter part of 1905 and first part of 1906, if McGowan desired to recover relations with the Parish claim why instead of sending Brookshire to Grant Parish, did he not turn to the former employe in his office, and open communications with the representative of the estate through a friendly, instead of through a hostile medium?

The letter of J. W. Parish, in addition to the testimony of Serven, show that the complainants could not, in good faith, deal with Grant Parish as his sister's agent. By the certain channel of the United States mail, they could, at any moment, have written to the executrix, had the facts justified: "We have an existing and valid contract with your father, under which it is our duty to prosecute his claim to a final determination, and we are ready to do so." The unequivocal abandonment of the contract was an embarrassment to saying this in black and white; especially in the uncertainty, as to whether the executrix did or did not know of her father's letter of September 15, and, in consequence of their own acquiescence in the correctness of the statements therein.

XIII.

No service rendered by McGowan in respect to the ice claim (still less by Brookshire, subsequently employed) preceded the date of McGowan's contract, viz., August 4, 1900.

It is stated in the bill "that for a long time prior to said last-mentioned date (August 4, 1900) the said Jonas H. McGowan had rendered professional services as a lawyer to the said Joseph W. Parish in the preparation and prosecution of said claim" (*i. e.*, the ice claim). Of this there is no proof. Mr. Morey, in answer to the question what personal knowledge he had of McGowan's connection with the case before the act was passed, answered: "Only what Mr. Parish told me and what Mr. McGowan told me." (This, of course, was subject to the objection that one who was claimant against the estate of Parish could not testify as to conversation with the decedent, and to the further objection that the claimants against the estate could not make testimony for themselves by testifying to conversations with themselves). Serven says the act of Feb. 17, '03, was drafted by McGowan, as at that date Serven was in Government employ, this at best was hearsay. Quite likely McGowan copied the act, which as shown, had been drafted in repeated Congresses before the contract with McGowan. The witness proceeded: "Why, Mr. Parish told me himself that Mr. McGowan had been his attorney for a number of years; ten or fifteen" (*id.*, 43). The service really rendered by McGowan will be considered later. There is evidence that McGowan in 1889 drew a sum of money from the Treasury under a power of attorney from Parish, but a sum of money having no relation to this ice claim. The recital in the bill: "The said Joseph W. Parish being desirous of securing the services of Elijah V. Brookshire (*i. e.*, at any time prior to the Brookshire contract with Parish) is not proof, but only an unproven averment." In the opinion of the trial Justice it is stated: "The words 'for value received' in Brookshire's contract must refer, we think, to such prior services, even though we hold ourselves to the exact wording of the contract, which very likely was intended to read '*heretofore*,' where it does read '*hereafter*'" (*id.*, 236). The contract of Parish

with Brookshire, dated January 3, 1903, states the consideration to be "for legal services *hereafter rendered and to be rendered* by E. V. Brookshire" (Rec., p. 27). To this Brookshire adds:

"Said Brookshire agrees to render necessary and proper legal services in the prosecution of the above-described claim *in the future* under the direction of said Joseph W. Parish.

"E. V. BROOKSHIRE."

(*Id.*, 28.)

The word "hereafter" in the contract is admitted to be in the handwriting of Brookshire (Rec., p. 189). On cross-examination Brookshire is asked: "*All of those services as you have detailed them rendered by you before committees of Congress and the executive departments of the Government were all rendered under and in pursuance of your contract of employment with Mr. J. W. Parish, were they not?*" "A. *And my contract of employment with McGowan. I had two contracts.*" "Q. You derived all of your authority to appear and act in this matter from those contracts, did you not?" "A. I think so" (*id.*, 76).

The counsel for appellee are unable to agree with the trial justice, that the words "for value received" must refer to prior services (Rec., 236); still less with counsel for appellants, that such service "the testimony shows without dispute had already been rendered by McGowan or Brookshire" (Brief, p. 11).

"The words 'value received' used in an instrument do not necessarily import a consideration to pay in money. A promise *to pay in the future* may have been the consideration." *Osgood v. Bringolf*, 32 Iowa, 265. "Not only does the phrase not necessarily import a consideration in money, but it does not conclusively import a consideration of any kind" (*id.*, 270). Hence in actions on bills or notes charged to be usurious, it has been held: "The

fact that the bill contains the words 'value received' does not make the mere offering of such a bill for sale or discount, a representation by S. or L. that it was actually accepted for value, received by the acceptor, which will preclude, or estop, either of them from proving the contrary."

Clark v. Loomis 12 N. Y. Superior Court (5 Duer.)
476.

If the unequivocal disclaimer did not exist, the words "for value received," would not of themselves imply value prior to the contract. In no case could the implication be so strong as to overcome the explicit statement to the contrary.

After setting out the agreements with McGowan and Brookshire, the 4th paragraph of the bill alleges: "Pursuant to the employment *above mentioned* and the agreements "hereinbefore set forth" save those of August 4, *operation and together* diligently prosecuted said claim." There was no "*employment above mentioned*"; no agreements "hereinbefore set forth" save those of August 4, 1900, January 20, 1903, and intermediately the assignment of December 3, 1902. There is no evidence of any service rendered by McGowan in respect to the ice claim prior to August 4, 1900. In the case of *Parish vs. U. S.*, 100 U. S., 500 (at October term, 1879), the report shows the attorneys for Parish in that court to have been John B. Sanborn and Ralph P. Lowe. The same attorneys were counsel in the Court of Claims, from whose judgment the appeal was taken. The irresistible presumption is that these attorneys were in place to look after the payments resulting from the litigation of which they had charge. The only payments prior to that ordered in *Parish vs. MacVeagh*, 214 U. S., 124, were made by the Court of Claims in 1880, and under the act of February 20, 1886.

XIV.

There is however, evidence of an interest in the Parish family manifested by McGowan as early as 1889, having no connection whatever with the ice claim; the papers relating to which might very well have been in McGowan's office, and in respect to which Parish, quite naturally, might have referred to McGowan as his counsel.

For the apparent purpose of showing the dependence of defendant on McGowan, complainants' counsel questioned her concerning an old suit in which McGowan and herself were involved (*id.*, 117). Some impatience having been manifested that after the lapse of more than twenty years the defendant could not recall the details with precision, at a subsequent meeting, she exhibited the record in *McDaniel et al. vs. J. W. Parish et al. and McGowan*, No. 257, December term, 1893, in this court. The bill charged that the premises now occupied by defendant had been bought with money of her father and the title taken in McGowan's name to hinder the creditors of Parish. McGowan answering that the purchase had been made for Miss Parish by an amended petition, she was made defendant (*id.*, 175). An amended petition was filed making Emily E. Parish a party defendant, and averring "That the defendant, Emily E. Parish, knew nothing touching the entire purchase of the property, except what was told her by the defendants McGowan and Parish" (*id.*, 175). The amended petition stated "that on the 18th of March, 1889, the United States issued its draft No. 27336 for \$18,000, payable to the order of J. W. Parish & Co., which was endorsed by said Parish to the defendant McGowan." McGowan testified that he "drew the money upon that draft." "I had," he stated, "two matters, each aggregating about \$18,000. One was for some barges that were broken up during the war on the Mississippi river. That was a Treasury matter, and

after it was allowed it went to Congress and an appropriation was made, which I had paid through the Treasury Department very much as I did the other matter, which was an appropriation for an ice contract." To whatever ice contract this may have related, it was not the one with which this suit is concerned. No appropriation therefor in the sum of "about \$18,000" was ever made by Congress; none therefore was made in respect to any claim which had been allowed before Congress was called upon to act, and no draft in payment thereof was issued at any time in 1889 or at any time after 1886. In seeking to find out what was paid over to Parish in order to find what, as plaintiffs contended, was subject to the claims of creditors, McGowan was asked: "Q. Will you please tell me how much you took out for yourself?" "A. I think, in justice to my client, I should decline to answer that question." "Q. *Do you decline to answer that question because you do not want to state the amount of money you paid to Mr. Parish, or because your fee was extraordinarily large?*" "A. *Because it is a matter between client and attorney, which should not be divulged*" (*id.*, 1721). Between this transaction in 1889 and August, 1900, there is no evidence of any service rendered by McGowan to Parish. Still less is there evidence of any service rendered by Brookshire at an earlier date than August, 1900. Assuming the more legal ground for objecting to answer the questions above recited, to wit, the size of the fee, it is a fair conclusion that McGowan had been superabundantly compensated for all that his talents deserved (*id.*, 175-6).

The defendant offered in evidence (Rec., pp. 158 *et seq.*) a deed of September 16, 1896, recorded the same day, from Emily E. Parish to Grant Parish. Another deed, made and recorded the same day, from Grant Parish to Emily E. Parish, wherein the grantor promises and agrees "to furnish his said sister at all suitable times with money and means to make such purchases of food,

materials, raiment, fuel, and all things proper and necessary to keep up and maintain her own personal wants and needs," and a third deed, of March 11, 1898, recorded the same day, from Grant Parish to Emily Parish of the premises aforesaid. This record proof disposes of the unproven charges as to the necessity of a resort to McGowan for the necessities of life. On August 6, 1896, McGowan wrote to Grant Parish acknowledging check for \$10.00, in payment of services to Miss Parish, and saying: "It is a great gratification to me to think that she has a nice little home now free of encumbrance, I believe, by reason of your assistance" (*id.*, 160). Here is proof placed on record a decade before this suit was imagined, showing that Miss Parish had no need to be the mendicant of McGowan, and was not.

XV.

Citations of proof by complainants, not found in the Record, but contradicted by the Record.

In the Brief in behalf of complainants, it is asserted, as a fact, not "the subject of any conflict or dispute": "That the complainants did make advances to supply the necessities of life to her testator (*i. e.*, the testator of Miss Parish), and herself.

The proof is quite the reverse. Miss Parish was asked: "Have you any means of refreshing your memory as to the time, when you first received money as a friendly assistance, or for your aid from Mr. McGowan?" "A. I don't remember any until after we went to Ocean Grove in June, 1903." "Q. And what was the amount?" "A. I think it was \$25 a week." "Q. And how long did that continue?" "A. Until we came back in the city, the last of October." "Q. For what purpose was it advanced?" "A. Mr. McGowan made the arrangement with my father." "Q. For what purpose was it used?" "A. For our expenses." "Q. For food and clothing?" "A. Not

for food and clothing. No; Mr. McGowan never bought any clothing for me." "Q. What was the money used for?" "A. As I said, for our expenses—our board" (*id.*, 129). "*Mr. McGowan never gave money for our household expenses*" (*id.*, 128)

Complainants proved a letter of September 29, 1903, from executrix, urging the importance of a speedy return to Washington, and complaining of the delay (*id.*, 132). "Q. What agreement justified you in writing this letter?" "A. We had been wanting to come home." "Q. What right had you, or what reason had you to complain to Mr. McGowan?" "A. Because it was through him that we were sent down to Ocean Grove." "Q. Why and under what circumstances did he send you down to Ocean Grove?" "A. Well that I don't know" (*id.*, 132). Counsel for Miss Parish interposed to claim, that in this investigation, not responsive to anything asked in direct examination, counsel for complainants made the witness their own. "Q. You saw him (Mr. McGowan) before going to Ocean Grove?" "A. Yes sir. I went to his office to ask him if it was necessary—we both objected to going—and he said he thought it was best" (*id.*, 134-5). These petty advances, which all told, could not have exceeded five hundred dollars (\$500), were made by McGowan to subserve his own purposes. They were made by McGowan to subserve his own purposes. They were not requested of McGowan by Parish, but imposed upon Parish by McGowan, and in reason and justice not the debt of Parish.

In the 5th paragraph of the bill it is averred: "For a long time prior to the death of the said Joseph W. Parish, he and his family had been in necessitous circumstances and in order to relieve their pressing *wants*, both of the complainants from time to time advanced to him *for the benefit of himself and family*, various sums of money, amounting in the aggregate to the sum of five thousand dollars, relying solely upon his promise to re-

pay the sums so loaned out of what might be recovered in respect of said claim." Not one word of this averment was attempted to be proved by the complainants who swore to it, and, as is shown by the foregoing, in effect, every word of it is denied in the testimony of the defendant.

Counsel of appellants in their brief (p. 25) refer to the sending of the Auditor's statement to Parish, care of Attorney J. H. McGowan, as "making denial impossible by the appellee, that at the time she instituted her mandamus proceeding, she knew that the award upon which her entire mandamus proceeding was based, had been secured while Mr. McGowan was her father's attorney." The imputation is that the appellee did make, or attempt to make such denial. The imputation is the exact reverse of the truth. The appellee here, the defendant then was asked: "Did you know during your father's lifetime, that these gentlemen (McGowan and Brookshire) were engaged in the prosecution of his claim against the Government on this ice matter?" "A. Yes, sir. I knew they were his attorneys" (*id.*, 116). What the appellee does deny; what her counsel sustain her in denying is, that after the letter of September 15, 1904, and acquiescence therein, McGowan and Brookshire could pretend to be the counsel of Parish or his estate.

The counsel for complainant state in their brief (p 105) the assertion of abandonment "rests, of course, upon the appellee who asserts it. The only evidence in its support is the *self-serving declaration* to that effect contained in the letter of Mr. Parish, of September 15, 1904" (Brief, 105). Certainly the counsel of the appellee have no quarrel with anything so sensible as the rule of common sense; that self-serving declarations, or declarations of a party in his own favor, are not admissible in his behalf. It has been said too often to need authority—No one can manufacture evidence for himself. Proof of conversations between parties on one side of a cause,

not communicated to the other are clearly inadmissible. *Graham v. Middleby*, 185 Mass., 353. It "violates an unbending rule of evidence, that a party to a suit cannot offer in evidence his own declarations." *Hagan v. Hendry*, 18 Md., 190. What then was the "self-serving declaration" of which counsel complain. It was a recital to McGowan of the language of the latter, in effect, abandoning the Parish case, and turning it over to Parish "to be managed in the future" by the latter; language which to the day of his death was never contradicted, or sought to be modified by McGowan. It comes before the court, not as the *self-serving statement* of Parish, but as the self-disserving statement of McGowan, as such an admission which it is not permissible to deny.

As an example of testimony not self-serving, the learned counsel gives the following: "He (McGowan) remarked in the hearing of the witness Serven, upon the suggestion of abandonment of the case by him; that after working on it for all these long years, any man who would abandon the case when it was so near the finish of it must be a fool (Brief, p. 99). Counsel for appellee respectfully submit, that the man must be a greater fool, who never made this speech, or any thing like it, to his own client. It is a speech never shown to have been made to anyone, until Serven took the stand, nearly six years after the death of Parish. It is not pretended that this was said in the presence of Parish. There was a slight attempt to insinuate that it was, but promptly abandoned (Rec., p. 91). It is respectfully submitted, that what McGowan is alleged to have said to his own partner in their own corner is emphatically "self-serving."

Of the interview of McKee with McGowan, the learned counsel stated in their brief (p. 22): "This interview with McGowan a few days *before* the death of Parish was necessarily after the open breach between Parish and the appellants represented by the letters *supra*" (i. e.,

the letters of November 19, and November 22, 1904). Here again is sought to be utilized the anger which they themselves so wantonly excited. The date of the interview however, is not that given by McKee as counsel here state. Mr. Darlington asked: "This interview (*i. e.*, with McGowan), as I gather from your deposition, was *after* the death of Mr. Parish?" "A. *Yes. Several days after.*" If what counsel term the "open breach" justified the cessation of service to the father from November 22 to December 26, 1904, as heretofore asked, was not this a time peculiarly appropriate to acquaint the daughter, that she had counsel under contract obligation to prosecute her claim and who were ready and anxious to do so. They insist that, on several occasions, by a species of indirection, they designed to give this information to the daughter. Would it not have been more honest, more earnest, and more manly, on at least, some one occasion to have made the attempt to do this directly. Neither Messrs. Cole & Donaldson at one time, nor Mr. Conrad, at another, fathomed the deep design. Certainly McGowan said nothing to suggest it to McKee.

XVI.

The counsel for appellants reply to a point alleged to have been raised in the Appellate Court, as an objection to the decree of the trial Court, viz.: "That if otherwise entitled to recover, the compensation of appellants should have been reduced by the services rendered by counsel employed by the appellee, which services lessened the labor appellants must otherwise have expended (Brief, p. 109). It is added: "No claim of such a deduction is set up in the pleadings or elsewhere in the record" (Brief, p. 113). The counsel for the appellee are prepared to admit, indeed, to insist, that what is not set up in the pleadings cannot be adjudicated; that what is non-apparent in the pleadings is nonexistent for trial.

Counsel for appellee, however, must add, that they are wholly unaware of having made any claim for the reduction of fees to appellants other than the claim that they are entitled to nothing; that is the reduction to nil. At the very time legal ability was needed they deserted their client; told him to look out for himself as best he could, but to expect nothing more from themselves. The fact that the appellants never lifted a finger, acknowledged inability (as stated in the letter of September 15) to offer a suggestion, is decisive of their claims. Full performance was a condition precedent.

XVII.

AUTHORITIES

Failure to prosecute the claim to a "final determination" was a breach of contract fatal to the claim of complainants.

"It is no less repugnant to the well-established rules of civil jurisprudence than to the dictates of moral sense that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it should be permitted to make that very engagement the foundation of a claim to compensation for services under it."

Stark vs. Parker, 2 Pick., 267.

"As the defendant's promise depends on a condition precedent, the condition must be performed before the other party is entitled to receive anything under it. The plaintiff has no right to desert the agreement and recover on a *quantum valebant*."

Cutter vs. Powell, 6 Term Reports, 320.

"If an agent, or attorney, having undertaken to collect a debt for a certain share of what he may recover, finally abandons further effort as useless, and at a subsequent period the principal receives payment, through new instrumentalities or from

causes with which the agent has no connection, he cannot claim the share to which his contract would have entitled him if payment had been secured by his efforts."

Scoville vs. Trustees, 65 Ill., 524.

"When a servant hires himself for a fortnight and quits at the end of ten days, in consequence of rough language from his master, he is not entitled to recover compensation for the ten days' labor."

Marsh v. Ralson, 1 Wend., 514.

"When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract." Fuller, C. J., in *Roehm vs. Horst*, 178 U. S., 1-9. (Affirming *Roehm vs. Horst* in 91 F., 345, where the syllabus is, "Where one party to a contract gives notice of his intention not to perform, the other is justified in treating such action as an anticipatory breach and may sue for damages without waiting for the time of performance.")

"In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated. * * * The English authorities in support of this proposition are unanimous."

Marks vs. Van Eeghen, 85 Fed., 855.

"If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered."

Tenney vs. Berger, 93 N. Y., 529.

Holmes vs. Berger, 129 N. Y., 140-141.

"The fact that the complainant never felt himself aggrieved until the bonds of the company had

risen to their par value, which only occurred *after this court had adjudged on appeal from the Supreme Court of this State* that the stockholders were personally liable for its debts, leads to the inference that the present suit was prompted more by a spirit of speculation than any sentiment that injustice had been done to him. At any rate, the claim now presented is a stale one. The claimant does not set forth *specifically* any grounds which could have constituted impediments to an earlier prosecution of his suit."

Marsh vs. Whitmore, 21 Wall., 184.

"A party who makes an appeal to the conscience of the chancellor should set forth in his bill *specifically* what were the impediments to an earlier prosecution of the claim." *Lansdale v. Smith*, 106 U. S., 392-3. "Otherwise the Chancellor may justly refuse to consider his case, on his own showing" (*id.*, 394).

"No delay for the purpose of enabling the defrauded party to *speculate upon the chances which the future may give him, of deciding profitably to himself, whether he will abide by his bargain, or rescind it, is allowed in a court of equity.* * * * The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property, to voluntarily await the event, and then decide, *when the danger which is over has been at the risk of another, to come in and share the profit.*"

Miller, J., in Twin Oil Lick Co. vs. Marbury, 91 U. S., 587.

"With full knowledge of all these facts, the appellant took no action until after this suit was brought, nearly four years after the sale; and *not until all the hazard was over*, and the defendant's skill, energy, and money had made his purchase profitable, was any claim or assertion of right made."

(*Id.*, 593.)

"Generally speaking, the contract of an attorney or solicitor retained to conduct or defend a suit

is an entire and continuing contract to carry it on until its termination, and if without just cause he quits his client before the termination of the suit he can recover nothing by his bill."

2 Greenleaf on Ev., sec. 142.

"The rule is correctly laid down in *Harris vs. Osborne*, 2 C. & M., 629, where Lord Lyndhurst said: 'I consider that when an attorney is retained to prosecute or defend a cause he enters into a special contract to carry it on to its termination.'"

Parke, B., in *Nicholls vs. Wilson*, 11 M. & W., 106.

Even if the express terms of abandonment did not exist, the delay of complainants of itself justified the employment of other counsel.

"Under such a contract as that existing between Shumway and Sloan, it is the duty of the attorney to exercise reasonable diligence in the prosecution of the suit, and if he fails to do this the client must be at liberty to seek other aid. *If compelled to do this, he cannot be required to execute the original agreement.* * * * We do not see how compensation can be given upon the principle of a *quantum meruit*. The contract is an entirety, and the attorney having failed to perform there can be no apportionment of compensation. * * * We cannot accept any of the excuses offered for the delay as a reasonable explanation. *The question in issue was merely one of law. The proof to be made in order to present the question was of the simplest character.*"

Walsh vs. Shumway, 65 Ill., 475-6.

During the space of nearly two years which had elapsed from the time of the Secretary's decision complainants had taken no action, had proposed no remedy, and the record shows had agreed on none to propose. It was only necessary for one more year of inaction to be added and no remedy at law would remain. Accord-

ing to their own proof, all the testimony, all the law had been repeatedly briefed by them. Had the defendant known of the contract and had it not been abandoned this delay would have justified her in treating it as at an end.

XVIII.

Failure to communicate to appellee information of the contracts under which complainants now claim of itself would have worked the virtual abandonment thereof, even had such contracts been still in existence.

Never once did complainants in speech or writing give any information to the defendant of the contracts under which they claim. In the case which follows there had been a contract prior to a testator's death. The court said:

"We think the referee clearly right in holding that the plaintiff not having notified the executor of the existence of this contract, and *allowing him to employ other counsel for the purpose of carrying on the litigation and thus having abandoned the contract, cannot now claim the sum which it is alleged was agreed to be paid.*"

Bolte vs. Fichtner, 68 Hun., 148-9.

The trial justice uses the language that the defendant ignored their (*i. e.*, complainants') "relation, although she must have known in a general way what it was" (*Id.*, 222). It is respectfully submitted that the terms of a contract cannot be made known "in a general way," but only in a particular way, by the inspection of the contract, or the clear and certain communication of the contents. The mere knowledge that complainants had acted for J. W. Parish was no notice of a contract which would be in force after his death. The defendant might well assume that complainants, who were ex-members of Congress, were employed for the Legislative, or Executive, and not for the Judicial Department.

Where defendant received from his brother for collection certain notes which did not fall due till after the brother's death, "Held, that defendant's agency ceased with the death of his brother."

Darr vs. Darr, 59 Iowa, 81.

Had there been no abandonment, the conduct of complainants was such as to indicate the opinion that their contracts had abated by the death of Parish, and that any further employment (if they wished it) had best be sought through counsel subsequently retained.

XIX.

Were the present appeal from the final judgment of a state court, if you found the judgment therein could be rested on independent and nonfederal ground, adequate to support it, you would esteem the judgment one, not "subject to review in this court." *Holden Land Company v. Interstate Trading Co.*, 233 U. S.

"Where the decision complained of rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court, without considering any federal question that may also have been presented."

Missouri, &c., R. R. v. Fitzgerald, 160 U. S., 576.

The right of appeal from the Court of Appeals of the District of Columbia varies little from that which exists in the case of the highest court of a State. The right of appeal, on the ground of the federal question which has been raised, will, however, be considered without further reference to this point.

By Section 3477 of the Revised Statutes the contract with McGowan and the contract with Brookshire are

made null and void. An interlocutory consent decree, before answer, containing no reference to any defense which would or might be made, did not waive a defense under the statute, as it did not waive any other defense to the bill.

The answer of the defendant (appellee here) on the second page hereof sets out the statute, which makes the contracts of complainants "*null and void*"; viz., said Section 3477, which provides:

"All transfers and assignments made of any claims upon the United States, or of part or share thereof, or of any interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment and must be acknowledged by the person making them before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer, and it must appear by the certificate, that the officer at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

None of the conditions to avoid the sentence—"shall be absolutely null and void," can be found in the case of the contracts, assailed by the answer.

The contract with McGowan provides that the latter shall have "*power to receive and receipt for any draft or other evidence of indebtedness which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated.*" This was

the assignment of 15 per centum of the amount of whatever government draft was received on account of the claim. The assignment to McGowan was so unquestionable and complete, that McGowan was able (December 3, 1902) to assign one-third thereof to Brookshire, by the words, "I hereby *sell, assign, transfer, and set over* to Elijah V. Brookshire the undivided one-third interest in a contract made between Joseph W. Parish and myself bearing date the 4th day of August, 1900," etc.

The contract of January 20, 1903, between Parish and Brookshire for the payment of 5 per cent of the award has: "*This contract to be an order upon the proper officer of the Government, or any one authorized to disburse said award so appropriated, and it is expressly understood that said Brookshire shall have a lien for the amount due him upon the amount of the said award when the same shall be made.*"

The difference between contracts and statute seemed to defendant's counsel to be one admitting of no compromise. Between contracts and statute was "irrepressible conflict."

That the contracts of complainants with Parish are *prima facie* prohibited by said section is practically conceded. It is, however, claimed and by the trial justice decided that by and under a consent decree the defense under the statute was waived. On the 22d of May, 1909, the bill herein was filed and the restraining order prayed for therein granted. Ten days thereafter, viz., 2d of June, 1909, before counsel could well have had time to confer with their client or to look into her case, an interlocutory consent decree was entered, dissolving the restraining order then in force as to all except the sum of \$41,000. This part of the \$181,358.95 awarded by the United States Supreme Court she (the defendant) was directed to turn over to Corcoran Thom, vice-president of the American Security and Trust Company, with power to him "to deposit the same when received with the American Security and Trust Company of Washington, D. C., to the

credit of this cause, and subject to *the further order of this court herein*, and subject to the determination by this court in this cause, *whether any amount, and, if so, what amount is justly due the complainants or either of them* for professional services rendered by them or either of them for and in respect of the matters described in the bill of complaint" (*id.*, 13).

The trial justice holds that the defense under the statute cannot be taken in view of this consent decree, saying: "No other question is reserved. What shall be done with the fund is declared to depend upon these two questions alone—is anything due? If so, how much?" (*id.*, 232). But when the question reserved is: "Whether any amount, and, if so, what amount is *justly* due?" is not everything going to show that no amount is "justly due" necessarily reserved, and when the proof offered to show nothing can be *justly* due is the express word of the statute; can this proof be ruled out because in an interlocutory consent decree, signed ten days after the filing of the bill, the defendant's counsel did not recite the grounds on which they would rely to defeat the claim of abandonment, nor as to any of the evidence which the defendant has produced. Is it all to be ruled out? Were not the contracts, given such prominence in the bill, "matters described in the bill of complaints?" The trial justice asks: "Can there be any doubt that thereby she (the defendant) *has eliminated the question of a lien upon the original fund?*" (*id.*) The defendant's counsel have very honest doubts upon that subject.

The learned trial justice added: "That question has been waived." (Rec., 232.)

Each side equally desired this decree and had reason therefor. Had the fund been suffered to remain in the Treasury, complainants would have been required to give an injunction bond ample to indemnify the defendant for the loss of interest on the fund which had been awarded her. On \$181,000, at six per cent, this would have been an annual loss of \$10,860, which during the five years

this cause has been pending would have amounted to \$54,300. The loss of comfort and welfare on other accounts to the defendant, would have been taken into consideration.

On the other hand there was the consideration to the defendant of the opportunity to withdraw from the Treasury all that was not in controversy.

The defendant and the defendant's counsel, it is plain, little dreamed that the "*waiver*," declared by the trial Justice, had been made. After first stating, that "because of the joinder in the same suit of two wholly distinct and unconnected claims, against the estate of her testator, arising under alleged wholly distinct and unconnected contracts with distinct and unconnected plaintiffs, it would be open to her to take by demurrer the objection of multifariousness," the defendant (here the appellee) expressly foregoes any advantage on this ground. In the next sentence is added, "The question of the validity of said contracts, she is advised, presents a more serious question, and *one which she is not at liberty to waive*" (Rec., 16). She then sets out in full said Section 3477.

Not only, is it obvious, that the executrix was unaware of the waiver of this defense, but it is fair inference that complainants' counsel could hardly have realized it, since to the defendant's answer, they filed their replication to put in issue everything which had been set up as defense to the bill. If the denial of the validity of the contracts had been waived by the consent decree, the replication should not have joined issue thereon, but should have shown that no issue could be raised concerning said section.

"If the matters set up in an answer as a defense have been previously adjudicated it should be set up by plea or replication, upon which issue can be taken, *so as to give the defendant an opportunity to present any evidence he may have on the subject.*"

Thriffs vs. Thriffs, 101 Ill., 458.

"The answer is considered true throughout unless put in issue by a replication; * * * If the complainant wishes to avoid the effect of matter pleaded in bar his proper course is to apply to amend the charging part of his bill."

Fletcher's Equity Pleadings, sec. 356; 2 Dan. Ch. Pr., 829-830-834.

The policy and purpose of interlocutory procedure is to prepare causes for hearing, upon their merits.

"The practice in courts of chancery gives to defendants a reasonable time to interpose a defense by way of demurrer and answer, and it would violate that rule of practice to grant the prayer of the bill merely upon its being filed and *upon a motion for a temporary injunction*. In this case the amended cross-bill had just been filed and appellees had not answered, nor had any steps been taken to place them in default. Unless it is on a bill *pro confesso*, on a decree to file an answer, under the rules of practice, a final decree cannot be rendered *except on a final hearing regularly had*."

Western Union Tel. Co. vs. Pacific & Atlantic Tel. Co., 49 Ill., 93.

The Consent Decree Does Not Present a Case of Res Adjudicata.

It cannot be contended that the appellee is bound on the principle of *res adjudicata*, for that relates to the binding effect of a judgment on the same matter directly in question, and does not relate to any matter incidentally cognizable, nor to any matter to be inferred by argument from the judgment. *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 494.

There is no sign that Judge Barnard ever read, or had been called on to read, a word of the bill; or knew more of it than that it was a bill for an injunction, on which had been issued the usual restraining order. There was no controversy of any matter before the Justice, who

by his signature to the decree brought to him to sign authenticated the agreement out of Court. He could not have decided on the merits; for on one side, the merits had not been pleaded, and were not pleaded for several months thereafter. The conditions for the exclusion of evidence on this ground are: "That the same identical matters shall have come in question already in a court of competent jurisdiction; *that the matter shall have been controverted, and that it shall have been finally decided.*" *Langmead v. Maple*, 114 E. C. L., 270.

How could that have been finally decided which could not have been known to the court for several months after the consent decree?

"The prior decree was the consequence of the consent, and not of the judgment of the court, and this being so, the court had a right to decline to treat it as *res judicata.*" *Laurence Manufac. Co. v. Janesville Mills*, 138 U. S., 561-2.

Nor Does the Doctrine of Estoppel Apply.

In Massachusetts, it was laid down by Shaw, C. J., that "in order to constitute an estoppel, the same point must be put in issue, *upon the Record*, and directly found by the jury." He says: "It results from the established rules of pleading, that this rule must be *strictly* confined to facts put *directly in issue*, and cannot be extended to collateral facts, or *facts to be deduced by inference from the verdict.*" *Eastman v. Cooper*, 15 Pick., 279. "It is necessary that it should appear that the precise point was in issue and decided, and *that this should appear from the record itself.*" *Kennedy v. Scovel*, 14 Conn., 69.

"To points which came only collaterally under consideration, or were only incidentally under cognizance, or *could only be inferred by arguing from the decree*, it is admitted that the rule does not apply." *Hopkins v. Lee*, 6 Wheat, 114.

"It is said, on behalf of plaintiff in error, that the appellees herein are estopped by reason of a finding made in the decree entered on April 24, 1894. * * * *The decree in question was entered by consent.* * * * Former adjudication, to constitute a bar, must have been on what was actually in issue and the determination of which was essential to the issue."

White vs. Sherman, 168 Ill., 612.

"The decrees were *entered by consent*, and in accordance with the agreement, *the courts merely exercising an administrative function, in recording what had been agreed to between the parties*, and it was open to the Supreme Court of Louisiana to determine, upon general principles of law, that the validity of Article VI was not in controversy or passed upon in the causes in which the decrees were rendered."

Texas, &c., Ry. Co. v. Southern Pacific Co.,
137 U. S., 56.

XX.

But had it been the expressed intent of counsel on both sides to "eliminate" from the issues to be tried any question touching the validity of the contracts, "it would have been out of their power to accomplish it, and out of the power of the court to permit it.

"The validity of a contract is to be determined by the state of the law *when it was entered into.*"
Wood on Master and Servant, Sec. 901.

"Courts, even with the consent of the defendant, will not enforce a contract in violation of a statute, *although not expressly made void.*"

Fowler v. Scully, 72 Pa. State, 456.

"Courts are instituted to carry into effect the laws of the country; how can they be made auxiliary to the consummation of violations of law? There can be no civil right, where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal" (*id.*, 466-468).

"Now it is a rule that those who come into a court of justice to seek redress, must come with clean hands, and *must disclose a transaction warranted by law.*" Lord Kenyon, C. J., in *Pettrié v. Hannay*, 3 Term Reports, 422.

The complainants, in their bill, disclosed a transaction, not warranted by law; viz., the protection of liens made *null and void* by express statute. The Court, being without jurisdiction to hear a cause, based on a contract prohibited by law, consent of parties, even if put in the form of a consent decree, in so many words condoning the illegality, could not give jurisdiction. "*We are all agreed,*" said Jervis, C. J., *that jurisdiction cannot be given by consent of parties, if we have none without it.*"

Vansittart v. Taylor, 4 Ellis & Blackburn, 912.

In *Ribbans v. Crickett*, the Court took notice of the illegality of a contract on which the action was brought, *although the defendant paid into Court an amount which he acknowledged to be owing by him upon two out of the three charges.* Verdict having been found for the plaintiff, motion was made for a new trial, on the ground, that part of the cause of action was contrary to law.

Eyre, C. J.: "Persons who engage in this kind of transactions must not bring their case before a Court of Law. *With regard to the money paid into Court, it is to be observed, that such payment is only an admission of a legal demand, and we cannot allow it to be applied to an illegal account.*"

1 *Bosanquet & Puller*, 266.

"The instruction given that if the contract was illegal, the illegality had been waived by the reconventional demands of the defendants was founded upon a misconception of the law. In such cases there can be no waiver. * * * The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No

consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons."
Coppell vs. Hall, 7 Wall., 558.

"That defect cannot be gotten rid of either by failure to plead it or by agreeing to waive it in the most solemn manner. *The law will not enforce contracts founded in its own violation.*"
Camp vs. Bruce, 96 Va., 524.

XXI.

Neither the averments of the bill nor the facts offered in evidence sustain the contention, heard for the first time in the argument, of a claim based on an attorney's lien.

The trial justice further holds that complainants do not need to assert any lien by virtue of their written contracts. Why? Because "upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor, they have a lien upon it to the extent of that compensation they are entitled to receive" (*id.*, 221); that such a lien like that adjudicated in *Price vs. Forrest*, 173 U. S., 410, "was one by operation of law and did not come within the statute" (*id.*, 220).

In *Price vs. Forrest* the lien asserted was one that arose under a judgment; it was a judgment lien, a lien not created by any act of the parties, but arising *in invitum*. There had never been an invalid contract under section 3477 or any other section. Every legal lien is a lien by operation of law. But when the contract under which the lien is asserted is illegal *in its inception*, it cannot be legalized thereafter by the appointment of a receiver or by any other proceeding in a suit to enforce it. It were useless to enact the law if such facility of evasion were made part of it.

At the hearing, it was argued by petitioners that their claim in reality is based, not on the contracts set up in their bill, but on an attorney's lien, not set up by any pleading. The liens claimed by the petitioners are not based on an implied agreement for payment of the reasonable value of their services, but on the express contracts carefully set out in their pleading.

After the recital of the contracts the bill avers (par. 4): "Pursuant to the employment *above mentioned* and the agreements *hereinbefore* set forth, the said complainants, in co-operation and together, diligently prosecuted the said claim and rendered valuable legal and professional services in respect thereto."

No other ground for the prosecution of "the said claim" is averred.

Nevertheless, it was said in the trial court, "But do the plaintiffs need to assert any lien by virtue of their written contracts? (*i. e.*, has section 3477 any relevancy to the case?) * * * Treating the question, therefore, as affecting only the plaintiffs and the executrix, are not the plaintiffs entitled to a lien upon the fund, if they are entitled for professional services in producing the fund? Upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor, they have a lien upon it to the extent of the compensation they are entitled to receive. *For these reasons we do not feel embarrassed by section 3477 in dealing with the case, as equity may require.*"

What is an attorney's lien?

(a) It is a lien on papers and documents received by the attorney from his client *and on money collected by him.*

In re Paschal, 10 Wall., 483.

(b) It is a lien upon the decree or judgment *obtained by him for his client* to the extent that the latter has agreed to pay him or, if there is no specific agreement

for compensation, *to the extent to which he is entitled to recover on a quantum meruit.*

Central R. R. vs. Pettus, 113 U. S.

No money was ever collected by appellants; no judgment obtained by them.

There was nothing adjudged by the auditor. The auditor was not empowered to render judgment. In this case claim no judgment or decree has ever been obtained for Parish by petitioners.

The judgment upon which an attorney's lien is claimed in the present case was rendered in a suit instituted by other attorneys in the Supreme Court of the District of Columbia, finally adjudicated in this court, and in which no appearance was entered and no aid of any kind received from or proffered by the plaintiffs. McGowan is shown to have abandoned his client and his cause, after the adverse decision of the Secretary of the Treasury, and the only judgment that was obtained was that rendered by this court through the services of other counsel.

XXII.

Complainants cannot claim an equitable lien on the judgment recovered in an action in which they entered no appearance, assumed no responsibility, in no way took part, nor in any way assisted, at any stage. They are required to show a lien upon a judgment recovered by them in a suit conducted by them.

The lien now asserted by complainants is for services in a wholly different forum from that in which judgment was finally recovered by the defendant, viz., for services before Congress and the Executive Departments. For the conduct of the action in which the defendant prosecuted her cause to a final determination the complainants were not (for that action) "officers of the court." Where a lien is given "upon a judgment it is for services

rendered in the particular action or proceeding in which the judgment was rendered" (*Forbush vs. Leonard*, 8 Minn., 268).

"In the present case the petitioners never came into possession of the moneys claimed; *they were procured by the services of other attorneys by legal proceedings subsequent to the date of the petitioner's claim. These subsequent services were necessary to realize anything upon the judgment, and the subsequent attorneys have their own lien upon the judgment and its proceeds for their subsequent services in the cause.*"

In re Wilson, 12 F., 241-3.

"Compensation for the services of the solicitors in obtaining the judgment in the State court, on which the suit to cancel the fraudulent conveyance is founded, cannot be allowed in the latter suit."

Adams vs. Kehler Milling Co., 38 F., 281.

XX.

The claim that an attorney's lien is a lien by operation of law is not supported by Nutt vs. Knut or Price vs. Forrest.

The opinion proceeds: It is not maintained by the defendant that the contracts were void, so far as they provided for the rendering of services by the plaintiffs and for their receiving compensation therefor. That question is settled by *Nutt vs. Knut*, 200 U. S., 12. Hence we fail to see what the statute has to do with the case in its present posture." The first thing settled by the authority cited is that a contract nearly identical with that between McGowan and Parish "*was in some important particulars null and void upon its face.*" In this case, however, "the plaintiff subsequently amended his petition and asked that in the event of his not being entitled to compensation under the Denver contract he have judgment

for such sum as his services were reasonably worth, which he alleged to be \$30,000." Under the amended pleadings, the case was finally decided. "Some of the defendants by their answers put the plaintiff upon proof of his case, but submitted to the court the question of the reasonableness of his claim for fees" (*id.*, 15). Such being the character of the amended petition, the decree below, Harlan, J., said:

"May be regarded as only giving effect to the agreement as to the basis upon which the attorney's compensation was to be calculated. It did not assume to give him any *lien* upon the claim or any priority in the distribution of the money received by Nutt's personal representative from the United States, nor upon any other money in his hands. Indeed *no lien is asserted by the plaintiff in his pleadings*. While the original petition asserted his right to be paid in accordance with the contract, *the plaintiff claimed if he could not be paid under the contract that he be compensated according to the reasonable value of his services.*"

This opinion related to a cause in which there had been no *abandonment* by counsel, but in which the counsel seeking compensation had prosecuted a client's claim to "a final determination."

The facts in *Price v. Forrest* are as follows: In 1857 Forrest recovered in the Supreme Court of New Jersey a judgment against Price for the sum of \$17,000 and costs. Execution upon that judgment was returned unsatisfied. This was a lien not at all by the voluntary but very distinctly by the involuntary action of the defendant, viz., *by the operation of law* upon all the property and effects of Price. In 1874 the wife of Forrest, as administratrix of his estate, sued out a writ of *scire facias* to revive the judgment and it was revived. In 1891 (thirty-four years after the recovery of the judgment against Price), by an act of Congress approved February 23, 1891, the Secretary of the Treasury was "authorized and directed

to adjust, upon principles of equity and justice, the accounts of Rodman M. Price, late purser," &c. The Secretary of the Treasury found due to Price from the Government \$76,204.08. In 1892 the administratrix of the estate of Forrest filed a petition stating that it had lately come to her knowledge that about \$45,000 was about to be paid to Price by officers of the Treasury, and praying that a receiver of the draft, or other negotiable security, be appointed, and that Price be ordered, on receipt of such draft or security, to endorse the same, to the receiver, *"to the end that the amount thereof might be received by him as an officer of the court and disposed of according to law"* (173 U. S., 412-415).

It was made the duty of the receiver to hold such drafts *subject to the further order of the court*. A bill filed July 5, 1894, alleged the claim on the part of the heirs of Price, that the balance in the Treasury belonged to them, and *not to the receiver*. It was further alleged that the officers of the Treasury Department were desirous of doing right and justice in the premises; and that the Treasurer "neither consented nor refused to do so, *but awaited the determination by some lawful tribunal of the right of the receiver in the premises.*"

In this court it was insisted by the heirs of Price that the orders in the State court assume to transfer the claim of Price in violation of section 3477. This court then reviews the decisions.

As the conclusion of the whole matter this court said: "It is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government, and ordering the claimant to assign the same to such receiver, *to be held subject to the order of the court for the benefit of those entitled thereto*, can be regarded as prohibited by that section" (173 U. S., 425).

It is respectfully submitted that this court did not hold that the mere appointment of a receiver *ipso facto* operated to transfer title to one of the parties to a suit "by

operation of law," but that the order of court assigning the matter in dispute to a receiver to be held until the determination by the court of the party legally entitled thereto was a proper order. Least of all was it held that an attorney's lien effected such transfer "*by operation of law.*" There was no claim of an attorney's lien to be considered. That which obtained respect was the final judgment of the highest court of the State of New Jersey; the most unassailable kind of transfer "*by operation of law.*"

In *Bank vs. Downie* the lien sought by two banks to be established was that created by the assignment of unallowed claims to secure loans, exceeding the value of the assignments made to cover them. The appellee Downie had been appointed receiver of the property of the assignors, who had been adjudged bankrupts. Downie subsequently qualified as trustee "authorized to collect all moneys due the bankrupts from the United States or any of its departments." The court repeats the language of Strong, J., as to section 3477:

"It would seem impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim or any part or share thereof. *It strikes at every derivative interest in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in any others than himself.*" * * * We can not say when the statute declares all transfers and assignments of the whole of the claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim or any part thereof shall be absolutely null and void, that *they are valid and effective as between the parties thereto, and only invalid when set up against the Government.*"

Harlan, J., continues:

"When G. and W. were adjudged bankrupts they were still in law the owners of these claims

against the United States, and all interest therein passed under the bankrupt act to their general creditors. * * * *Any other holding will effect a repeal of the statute by mere judicial construction in disregard of the plain unequivocal intent of Congress*" (218 U. S., 356).

XXIII.

The appellee again invokes the doctrine; A decree must be sustained by the allegations in the pleadings. A claim arising under a quantum meruit, and a lien based thereon is not alleged.

"The bill must contain every fact essential to the plaintiff's cause of action. *For no evidence will be admitted or considered to prove any fact not alleged in it.*"

Foster's Fed. Pr., Sec. 67.

"Where a party gives a reason for his conduct and decision touching anything involved in controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Railway v. McCarthy, 96 U. S., 267.

"In equity the proofs and the allegations must correspond. The examination of the case by the court is confined to the *issues made by the pleadings*. Proofs without the requisite allegations are as unavailing, as such allegations would be without the proofs requisite to support them. * * * It is a just commentary to say that such a litigation is always to be expected in a case like the present. *There are always those ready to gather where they have not sown.*"

Rubber Co. vs. Goodyear, 9 Wall., 793.

"The proofs must be according to the allegations of the parties, and if the proofs go to matters not

within the allegations, the court cannot judicially act upon them, as a ground for its decision, *for the pleadings do not put them in contestation*. The *allegata* and the *probata* must reciprocally meet and conform to each other."

Story, J., in *Harrison vs. Nixon*, 9 Peters, 503.

Only the facts averred become issuable.

"It is hardly necessary to repeat the axioms in the equity law of procedure: That the allegations and the proof must agree; that the court can consider only what is put in issue by the pleadings; *that pleadings without proofs and proofs without pleadings are equally unavailing, and that the decree must conform to the scope and object of the prayers and cannot go beyond them.*"

Washington R. R. vs. Bradleys, 10 Wall., 302.

The prayer of the present bill is for a decree that McGowan is the equitable owner of one-tenth part of the award; entitled to receipt for the same, as having an equitable lien thereon; and a prayer for a similar decree, in favor of Brookshire.

Counsel for complainants expend energy and consume space to prove that when the statute says "absolutely null and void," it means voidable. Counsel for appellee are content to suffer the statute to speak for itself.

XXIV.

Interest is not recoverable on a claim for unliquidated damages, prior to the determination of the principal sum due.

"A claim against a decedent's estate for services is for unliquidated damages until the amount is ascertained, and therefore draws interest only from the time of ascertainment."

In re Hartman's Estate, 35 N. Y. Supp., 495.

"The law does not allow interest on unliquidated damages, and equity follows the same rule."

Van Bensen vs. Van Gaasbeck, 4 Cow., 499.

"The action was brought to recover for professional services as attorney and counsel with a small claim in addition for disbursements. * * *

The suit was, therefore, on a *quantum meruit* for work, labor, and services. It was decided a half century since (3 Cow., 393) that interest was not allowable on an unliquidated claim for work, labor, and services. The rule has been uniformly adhered to in all the courts of this State."

Gallup vs. Perne, 10 Hun., 526.

XXV.

Complainants did not have the right to see without objection the employment of others to prosecute the claim deserted by themselves, and then to claim for the work of others as their own.

Importance is assigned to the following in the agreement between McGowan and Parish: "This agreement shall not be affected in any particular by any revocation of the authority granted or which may be granted to the party of the second part, nor by any services rendered or which may be rendered by others, or by the party of the first part, his heirs or legal representatives, or by any of them." It seems sufficient to say that the provisional exigency herein contemplated did not take place. There was no "revocation" by the party of the first part of the authority granted to the party of the second part. This is an event which never took place. The breach of duty by McGowan in the "revocation" of his own obligation under the contract cannot entitle him or his associates to claim for the performance of duty by another under another contract.

HOLMES CONRAD,
LEIGH ROBINSON,

Solicitors for Appellee.

